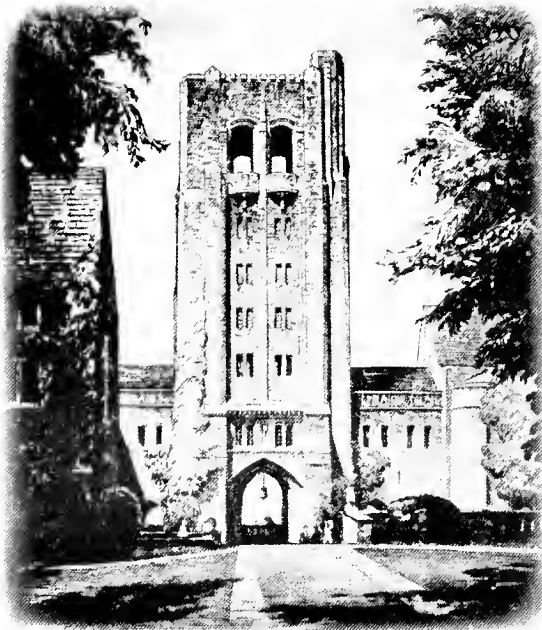


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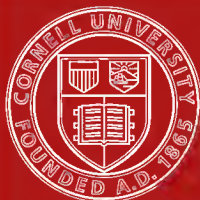
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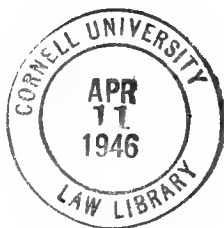
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THE
LAW OF USES

BY
WILLIAM HANBURY JONES, ESQ.



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TO

SIR ROUNDELL PALMER,

HER MAJESTY'S SOLICITOR-GENERAL,

WITH SINCERE ADMIRATION AND RESPECT,

AND BY HIS SANCTION,

THESE PAGES ARE INSCRIBED.

INTRODUCTION.

WHEN Sir William Blackstone published his "Commentaries," there existed little to facilitate the knowledge of Real Property. There were, it is true, "Coke upon Littleton," "Coke's Reports," Brooke's, Bacon's, and Viner's Abridgements, Perkins, "Hale's Analysis," "Sheppard's Touchstone," Treatises by Pigott, Bacon, and Gilbert, and the luminous judgments of Lord Hardwicke in Peere Williams, Atkins, and Vesey senior; but these, although affording copious materials, were not methodised, or reduced to system, and the task of obtaining a clear and comprehensive view of the law of property was most arduous.*

"Blackstone's Commentaries,"—certainly a wonderful performance,—was followed by the Notes of Hargrave and Butler to Coke Littleton, the Treatises of Mr. Fearne, and the labours of Watkins, Cruise, Powell, Butler, Sanders, Preston, and Sugden, which further

* The writer on referring to "Printed Cases and Opinions," has often marvelled at the intuitive perception and piercing discrimination of Mr. Booth. Lord St. Leonards seems his parallel.

reduced this chaos of materials into order ; formed as it were, codes by way of treatises on the several branches written on, afforded landmarks, and elucidated the science. There were also the inestimable presidencies of Lord Eldon and Sir William Grant in the Court of Chancery, the learning of Lord Kenyon, and the clear judgment and masculine intellect of Lord Ellenborough. But still, in the earlier part of the present century, the student was sorely harassed ; he had to cope with the law of lineal and collateral warranties, that of discontinuance, the question of rights of entry or of action, whether the remedy was *droiturel* or ancestral, the doubts on making a tenant to the *præcipe*—as to single or double voucher, what particular fines were requisite, and as to their efficacy—constructive or implied revocations of wills, by remodification of ownerships, and numerous other intricacies, which have been happily swept away.

The statutes passed in 1833, did much to relieve the law from these subtleties, and unnecessary difficulties. The Act for the abolition of Fines and Recoveries will ever reflect honour on Mr. Brodie. The simple, lucid, and comprehensive enactments of the 8th and 9th Victoria, cap. 106, with the aid of the new Statute of Wills, have also greatly tended to amend the Law of Real Property.

It would be but bare justice to acknowledge the great aid which has been rendered by Mr. Justice Williams' "Law of Executors," and the "Treatise on Wills," by the

late lamented Mr. Jarman, as also by Mr. Coote, in the *only* "Book on Mortgages," and by Mr. Lewin's careful "Treatise on Trusts."

Duval or Christie, neither could find time to give to the profession any published result of his acute and powerful intellect. Hayes has taught well and fearlessly, but Francis and Samuel Turner have been silent. Why have we no printed memorial of their well-recognised knowledge? Why live only in tradition? Dart's "Compendium," considering who had preoccupied the subject, was no ordinary task, but ably has it been performed. Whoever desires to investigate the philosophy of English law should attentively peruse Herbert Broom's "Legal Maxims." It is a most instructive work, and shows diligent research. The industry of Joshua Williams is as untiring as it is successful in the advancement of legal learning. The judicious but too few efforts of Prideaux must induce regret that failing health compelled him to leave the metropolis; but their reputation followed him, and the further exercise of his abilities has not been lost to the profession.

The main structure of the English Law of Real Property remains, and must remain; and Uses, and the statute reducing them into possession, cannot but form an essential portion of the Law of Conveyancing.

The Statute of Uses, as is well known, was enacted in the reign of Henry VIII. Its object, if not to extirpate, was to mitigate or remove some of the mischiefs from uses,

as stated in its preamble. These uses had been devices which, however originally introduced, were not illaudably applied for the removal of many of the inconveniences from the narrowness and strictness of the rules of tenure and of alienation at the Common Law, much of which arose from the feudal system that had been introduced by the Normans.

It is as a necessary consequence, that whenever a colony is planted, rules must be established to define the rights and duties, and regulate the conduct of the inhabitants. Those primarily would emanate from the will or with the consent of the original colonists ; but by the law of England, a British subject cannot abnegate his allegiance to the Crown ; he cannot seize an uninhabited island, and constitute himself sovereign thereof. Whenever British subjects form a plantation or colony, they carry with them the English laws. The sovereignty belongs to the King or Queen of Great Britain, and all those laws then existing in England, which are not merely the offspring of feudal tenures, subinfeudations, or custom,* or are not local, as the Poor Laws, the Turnpike Laws, attach. Among the laws so engrafted is the Statute of Uses. Thus, therefore, in Australia, where Saxon never trod, nor Norman ruled, the Law of Uses prevails, and the transfer of land, except where varied by the Colonial Law—as with us, often modified by our railway and other statutes—must prevail.

* Robinson Crusoe could not have made Man Friday a copyholder.

Uses, consequently, have an important effect on the transfer of land, not only in England or Ireland, but in other dominions of our Sovereign, with the exception of Scotland, the Isle of Man, and colonies acquired by conquest or treaty, where the old law is retained.

Their practical working is so interwoven with the structure of English conveyancing, that, however by means of partial or particular legislation portions of its law may be abrogated or annulled, still the knowledge of its principles must be essential to a real property lawyer.

It is true, that if a code were practicable, propositions might be extracted which would form rules, into the reasons whereof a practitioner need not inquire. But codification, so as to cope with the innumerable ramifications of the English law, is impracticable. "There cannot be a finite rule for an infinite matter." The law of analogies must still prevail ; and uses will continue to guide or control the lawyer or to perplex the student.

The principles of the Law of Uses are not many, and may be mastered with moderate attention ; and thus the knowledge of an apparently recondite and difficult subject be obtained.

It is not for the well-versed lawyer these pages mainly are intended, but for the legal pupil, or solitary student. To extract propositions from text-books, or the reports, however successfully accomplished, is not alone sufficient : they must not in each instance, be abstractedly submitted

without elucidation or explanation ; for that would be rather to dogmatise on, than to teach, the law.

The "*Ita lex scripta est*" becomes a mere effort of memory, often without result. Far better adopt the maxim prefixed by Mr. Fearne to his admirable "Treatise on Contingent Remainders,"—" *Scire autem proprié est, rem ratione et per causam cognoscere.*" In pursuing that course the reasoning powers of the student are exercised, and his former impressions often corrected or confirmed. An intellectual charm is evoked in connecting the chain of reasoning, and gratification ensues on solving or comprehending the problem. The legal fabric is thus raised slowly, possibly, but still surely, and gives the promise of endurance. Law has been somewhere termed a series of hidden analogies or unseen dependencies. An attempt will herein be made to evince the analogies, and to show the dependencies, upon the subject treated on. Perhaps this may expose the writer to the charge of tedious repetition, or prolixity ; but it seems better to incur that risk, than not to make the effort.

The origin of this work was *viva voce* lectures on uses among other branches of conveyancing, delivered to pupils, and by them kindly committed to writing, and since revised and corrected.

The author does not venture wholly to ascribe to this mode of explanatory study the success of several pupils in the legal examinations. Mr. William Whittaker Barry, one of them, obtained the first law studentship, and has

published an earnest and correct treatise on the "Statutory Jurisdiction of the Court of Chancery." The writer's friend and former pupil, Mr. Pearce Peachey, who was lecturer for two years at the Law Institution, has edited a treatise of great merit on "Marriage Settlements." If these gentlemen have not yet obtained the full meed of their professional labours, let them bear in mind the Canning and the Harcourt mottoes.

4, FIELD COURT, GRAY'S INN.

March, 1862.

The "Commentaries" were first published in 1765. The times and the law are indeed changed since then. The veriest stickler, "*stare super antiquas vias*," will admit, somewhat for the better. Then there were kept in the yard of Newgate pickling-tubs for human heads, which were afterwards displayed on Temple Bar. In Dodsley's "London and its Environs, 1761," there is a print of that city gate with three lofty poles surmounted by heads; and Boswell, in his "Life of Johnson," narrates the classic remark by Goldsmith thereon. It must have been a pleasant sight for the Master of Osterley, when, in a May morning, he came to the sign of the Sunflower, No. 1, Fleet Street. In 1777, Mary Jones, a young and remarkably handsome female, aged 19, whose husband had been pressed on the apprehended rupture on the Falkland Islands, whose goods had been seized for the debt of her husband, and who with her two children were turned into the streets, naked, destitute, and without food, went in desperation into a shop on Ludgate Hill, was seen to secrete a piece of coarse cloth, but on being detected replaced it on the counter. The Shoplifting Act, which denounced the penalty of death *on the attempt only*, was enforced against her; and, notwithstanding the parish officers vouched for the truth of

her statement, she was executed, and her baby, sucking at her breast, was taken from her when she went to be strangled.

About the same time, nearly a score of wretched beings were "worked off," as Dennis would call it, by hanging opposite the debtors' door in Newgate, or on the site of Connaught Square, where Tyburn Tree formerly stood.

So at that period in the House of Commons, when it was urged that there should not be any taxation without representation of the American colonies, a member, and King's Counsel, gravely urged, that because there had been a grant by the Crown of a province in North America, to be holden of the Manor of East or West Greenwich, (it matters not which,) the same was virtually in Kent, and represented by the members for that county. The Honourable Society of the Inner Temple refused to call Mr. Luders to the Bar, because he had written against imprisonment for debt. In March, 1789, a woman was sentenced to be burnt to death for coining. The stool whereon she stood was wrenched from under her, her neck dislocated, and the yet warm body fastened to a stake and burnt opposite Newgate. The *peine forte et dure* was enforced, and females were flogged. Even in our day, in Mary Ashford's case (1 B. & Ald. 405), the trial by duel was allowed by the Court of King's Bench, on appeal of murder. It has since been abolished.

In these times there was no "Jurist," "Law Magazine," "Legal Reporter," "Law Times," "Solicitors' Journal," or other similar valuable periodicals, to awaken the legal mind on the passing legislation and decisions. There are occasionally papers in the "Jurist" of great pith and discrimination, signed G. S., the initials of a gentleman of talent and learning. The profession is much indebted to such writers, now that the new subject matter of railways, joint-stock companies, tithe and copyhold enfranchisement, and many others are added as fresh subjects for legal doubt or difficulty.

CONTENTS.

CHAPTER I.

OF OWNERSHIPS AT THE COMMON LAW, IRRESPECTIVE OF THE LAW OF USES.

	PAGE		PAGE
1. Mode of conveyancing at the common law. Land in possession, in remainder, or reversion	2	14. This therefore prevented an interval between a particular estate and remainder	5
2. Livery of land in possession	<i>ib.</i>	15. But a remainder could be limited in the alternative of two events	6
3. Grant of land in reversion or remainder	<i>ib.</i>	16. But <i>ad interim</i> the fee would have remained subject to the particular estate in the owner	<i>ib.</i>
4. Writing or charter of feoffment only record of the transaction. It operated nothing	<i>ib.</i>	17. This fee simple was grantable subject to the contingency	<i>ib.</i>
5. Reasons why livery must be made, or grant take effect <i>instantly</i>	<i>ib.</i>	18. This the doctrine of Mr. Fearn. Mr. Preston held otherwise	<i>ib.</i>
6. An intended future feoffment or grant must have left the land with the owner	3	19. As to the livery, where first estates for years, if a vested estate, to take effect in remainder. Livery to termor	<i>ib.</i>
7. A feoffment or grant <i>in futuro</i> also contrary to the policy of the common law	<i>ib.</i>	20. But if the fee to be limited in contingency expectant on the term, the livery would be void. This the rule—that an estate of freehold must support a contingent remainder	7
8. This is still the law	<i>ib.</i>	21. Freehold could never be put <i>in futuro</i> by act of the party	<i>ib.</i>
9. A condition at common law could not be for the benefit of a stranger	<i>ib.</i>	22, 23. Mr. Fearn's and Mr. Preston's reasons	<i>ib.</i>
10. Jealousy against assignment of rights of entry or action	4	24. Inconvenience of this strictness	8
11. Instances where as the condition could not be in the first instance given to a stranger, it could not by circuitry	<i>ib.</i>	25. Which led to the continuance of uses	<i>ib.</i>
12, 13. Further explanation why a grant <i>in futuro</i> could not be made of a reversion	<i>ib.</i>		

CHAPTER II.

OF USES BEFORE THE STATUTES RELATING THERETO.

	PAGE		PAGE
1. Introduced by the clerical chancellors for the Church. Application thereof ignored at law	9	11. Privity of estate	12
2. Properties of the use. Mere right an assignable fee, without words of limitation, not escheatable or forfeitable, except by express enactment devisable	10	12. Privity of person touching the estate	<i>ib.</i>
3. Instance and effect of its operation	<i>ib.</i>	13. Rightful ownership. Nature of use. Purchaser for value without notice	13
4. Under covenants to stand seised	<i>ib.</i>	14. Persons not bound by the use. Disseins, &c.	<i>ib.</i>
5. Implied under contract by bargain and sale	<i>ib.</i>	15. Lord by escheat. Tenant by curtesy in dower	<i>ib.</i>
6, 7. Unlimited nature thereof. Subsequent alteration	11	16. Purchasers for valuable consideration without notice of the use	14
8, 9, 10. Nature and property of the use did not charge the land, but affected the owner with privity	<i>ib.</i>	17. Interference of the Court of Chancery	<i>ib.</i>
		18. Where it would not interfere	<i>ib.</i>
		19. Inconvenience of this divergence of legal and equitable ownership	15

CHAPTER III.

THE STATUTES OF USES.

1 RICHARD III.	16	27 HENRY VIII.	16
------------------------	----	------------------------	----

CHAPTER IV.

THE STATUTE OF ENROLMENTS.

27 HENRY VIII. Cap. 16.

1. The Statute of Uses executed every use, whether on a bargain and sale or covenant to stand seised, or conveyance operating by transmutation of possession	20	passed an estate without deed, livery, or attornment	20
2. But as bargains and sales were contracts, and might be merely oral, there would thereby have		3. Reason, therefore, for the Statute of Enrolments, and summary of its enactments	21
		4. Covenants to stand seised, necessarily being by deed, not within the mischief of the statute	<i>ib.</i>

CHAPTER V.

ON THE SCOPE AND EFFECT OF THE STATUTE OF USES.

	PAGE		PAGE
1. First impression of the Judges that uses were to be extinguished, but corrected on subsequent consideration	22	7. But a term of years raisable by limitation of use	24
2. Instances where uses were annihilated	<i>ib.</i>	8. Privity of seisin to the use. No use upon use	<i>ib.</i>
3. The statute does not give larger legal estate in the use, than there is, seisin to supply same	23	9. Instances thereof	<i>ib.</i>
4, 5. Instances thereof	<i>ib.</i>	10. Bargain and sale to one to the use of another	25
6. Uses not executed on a possession for years	<i>ib.</i>	11, 12. Consequences of inattention to the rule, that there cannot be a use of a use	<i>ib.</i>
		13. Further instances thereof	26

CHAPTER VI.

DISTINCTION ON OWNERSHIPS BEFORE AND AFTER THE STATUTE.

1. Preliminary inquiry	28	10. Mode by which an heir might take by purchase, by feoffment, and re-infeoffment, &c.	30
2. Rules at the common law irrespective of uses	<i>ib.</i>	11. This circuitry needless since the Statute of Uses	31
3. Seven examples of these rules:—		12. Alternative in the law that heir might take as purchaser, by 3 Will. 4, c. 106, s. 3	<i>ib.</i>
(1.) Freehold could not be placed <i>in futuro</i>	<i>ib.</i>	13. Main objects of the Statute of Uses, and new results thereof	<i>ib.</i>
(2.) Livery or grant defeasible only by condition	<i>ib.</i>	(1.) May be use of freehold <i>in futuro</i>	32
(3.) Condition must have defeated whole estates conveyed	<i>ib.</i>	(2.) One estate defeasible by another	<i>ib.</i>
(4.) Benefit of condition could not be for strangers	<i>ib.</i>	(3.) Priority of estates may be changed	<i>ib.</i>
(5.) No feoffment or grant to wife	<i>ib.</i>	(4.) Persons taking it several times may be joint-tenants	<i>ib.</i>
(6.) Grantor could not take a particular estate	29	(5.) Estates of freehold may determine without entry	<i>ib.</i>
(7.) Could not make his heir a purchaser	<i>ib.</i>	(6.) New estate descendible as land of which use determined	<i>ib.</i>
4. Reasons for or causes of 1st, 2nd, 3rd, and 4th rules	<i>ib.</i>	Explanation of last proposition	<i>ib.</i>
5. As to 5th rule	<i>ib.</i>	14. <i>Cestui que</i> use before statute had no legal right in or to land	<i>ib.</i>
6, 7. As to the 6th rule. Discussion on policy of the rule	<i>ib.</i>		
8. Analogy to rule in Shelley's case	30		
9. Reasons for the same	<i>ib.</i>		

	PAGE		PAGE
15. No escheat of use, but of land before statute . . .	32	common law and statutory ownerships . . .	35
16. No necessity to construe uses before statute, according to the rules of tenure . . .	<i>ib.</i>	26. Introducing conditional limitations, springing uses, &c. . .	<i>ib.</i>
17. Nor why the trustee to the use should not have dealt with the land according to the use declared . . .	33	27. The conduct of the Judges discreet . . .	<i>ib.</i>
18. As to descent of use . . .	<i>ib.</i>	28. Perpetuities avoided by construction of conditional fees, but enacted by the Statute de Donis . . .	<i>ib.</i>
19. Difficulties of the common law Judges on applying the pre-existing rules of tenures to uses after the statute . . .	<i>ib.</i>	29. Effect of Taltarum's case. Strictly no perpetuity at the common law . . .	36
20. Scope of 2nd section of the statute . . .	34	30. Such at least the opinion of Lord St. Leonards and of Mr. Preston. Doubt of Mr. Lewin . . .	<i>ib.</i>
21. How applied by the Judges . . .	<i>ib.</i>	31. The Judges adhered to the rules of the common law where possible. Contingent remainders, conditional limitations . . .	<i>ib.</i>
22. Difficulties as to the new ownerships . . .	<i>ib.</i>	32. Rule against perpetuities applied to springing or future uses and conditional limitations . . .	<i>ib.</i>
23. Result of their decisions seemingly perplexed in result, but inevitable . . .	<i>ib.</i>		
24. The duty of the Judges in construing such new ownerships . . .	35		
25. And hence the double system of			

CHAPTER VII.

USES AFTER THE STATUTE.

1. Every class of pre-existing use executed into estate according to the common law, if practicable. If not, then conformably to the ownership in the use . . .	38	8. As to the incapacity of or disclaimer by grantees to uses . . .	41
2. The various uses which existed at the time of the statute . . .	39	9. Where grantee to uses deceased . . .	<i>ib.</i>
3. As to present or immediate uses . . .	<i>ib.</i>	10. Subject-matter for operation of uses . . .	42
4. Future or contingent uses . . .	<i>ib.</i>	11. Of matters which in themselves lay in user . . .	<i>ib.</i>
5. Essentials to the operation of the statute . . .	40	12. There must be a use <i>in esse</i> . . .	<i>ib.</i>
6. As to seisin to the use, and herein of corporate bodies taking to or giving the use . . .	<i>ib.</i>	13. As to future uses and liability to escheat of seisin to the use . . .	<i>ib.</i>
7. Capacities of grantors and grantees to uses . . .	41	14. As to destruction of use by alteration of seisin, and herein of <i>scintilla juris</i> . . .	43
		15. As to its qualities . . .	<i>ib.</i>
		16. Its inconvenience and abolition . . .	44
		17. Privity of seisin to use . . .	<i>ib.</i>

CHAPTER VIII.

ON THE SEVERAL KINDS OF USES.

	PAGE		PAGE
1. Uses divisible into express, implied, resulting, or remaining uses, future, springing, or shifting uses	46	6, 7. And results	48
2. Express uses	<i>ib.</i>	8. For what ownerships resulting uses may be	<i>ib.</i>
3. Implied uses	<i>ib.</i>	9. Explanation thereof	49
4. Resulting uses only on assurances taking effect by transmutation of possession . .	47	10. Where uniting with estate executed to subsequent use . .	<i>ib.</i>
5. Instance thereof	<i>ib.</i>	11. Difference of uses by resultancy, and by implication	<i>ib.</i>
		12. Remaining uses	50

CHAPTER IX.

DISTINCTION BETWEEN CONTINGENT REMAINDERS AND CONDITIONAL LIMITATIONS.

1. Distinction between contingent remainder and conditional limitations, less material since 8 & 9 Vict. c. 106, s. 8 . .	54	9. So a use limited <i>quasi</i> in remainder might have defeated the use previously limited . .	56
2. Remainder created by same deed or compound assurance as particular estate	55	10. No rule of tenure infringed by such a construction of uses . .	<i>ib.</i>
3. Estate by one deed, and another subsequently by distinct assurance, not particular estate and remainder . .	<i>ib.</i>	11. Exposition of this first distinction of the law of uses . .	57
4. Essentials to validity of remainder to take effect <i>eo instante</i> , the particular estate determined and not to defeat the estate	<i>ib.</i>	12. And on the second	<i>ib.</i>
5. Example of an attempted remainder after an interval subsequently to the determination of the particular estate . .	<i>ib.</i>	13. Construction after the statute that all assurances should if possible take effect by the common law; but where not then the ownership under the law of uses allowed	<i>ib.</i>
6. The effect of such an attempt . .	56	14, 15. Example and effect on the interval between the first and next succeeding limitation of the use	<i>ib.</i>
7. Effect at common law of the remainder being intended to determine the particular estate . .	<i>ib.</i>	16. Resulting use	58
8. Previously to the statute such an interval might have existed on limitations of uses	<i>ib.</i>	17. Effect thereof	59
		18. Further explanation	<i>ib.</i>
		19. Destructibility of contingent remainders	<i>ib.</i>
		20. Effect of the 8th section of the 8 & 9 Vict. c. 106	60
		21. State of the law previously thereto	<i>ib.</i>

	PAGE		PAGE
22. As to the assignments previously for valuable consideration of such rights	60	on attempted assignment of such rights	60
23. Instances where a Court of Equity interfered or declined		24. Effect of the enactment 8 & 9 Vict. c. 106, s. 6	61

CHAPTER X.

ON A DEVISE TO USES.

1. Authorities that there may be such devise	65	St. Leonards for avoiding that difficulty	65
2. On death of devisee in testator's lifetime. Suggestion of Lord		3, 4, 5. Comments thereon	ib.

CHAPTER XI.

ON RESULTING USES, WITH REFERENCE TO DISPUTED QUESTIONS THEREON.

1. Fixed future use. <i>Cestui que</i> use has no estate or seisin until the use takes effect	67	7. Difference of opinion where limitation of the use to grantor for years	68
2. But the benefit thereof devisable or descendible, and now alienable by 8 & 9 Vict. c. 106	ib.	8. Cases of <i>Adams v. Savage</i> , and <i>Rawley v. Holland</i>	69
3. State of law previously to that enactment	68	9. Opinions thereon of Butler, Sugden, Serjeant Hill, and Mr. Preston	ib.
4. Effect of such enactment	ib.	10. Cogency of remarks of Mr. Sanders	ib.
5. Indestructibility of fixed or future springing or contingent use	ib.	11. Observations thereon	ib.
6. No resulting use to grantor where express limitation of the use for the whole period of his life	ib.	12. Opinion of Mr. Butler seemingly preferable to that of Lord St. Leonards	ib.

CHAPTER XII.

SPRINGING, SHIFTING, OR SECONDARY USES.

1. These denominations indiscriminately applied, but seemingly impossible to be accurately distinguished	71	Practically a real shifting use seems illegal	71
2. A shifting use in common parlance	ib.	4. Shifting use must operate within the limit against perpetuities	72
3. Incorrectness of distinction.		5. Discussion of the complicated questions thereon foreign to the present work	ib.

CHAPTER XIII.

ON THE LAW OF ESCHEAT, AS REGARDS RESULTING USES.

	PAGE		PAGE
1. Resulting use, consequence of a limitation of a future use, but intermediate use declared	73	there can be any escheat of a fee acquired by resulting use and inquiry thereon	74
2. Part of the original dominion of the grantor vested, liable to be divested if future use in contingency that does not happen, the estate by the resulting use becomes indefeasible	<i>ib.</i>	7. Semble that proposition that escheat cannot be of determinable fee does not decide the point	<i>ib.</i>
3. Is alienable, devisable and descendible	74	8. Question then whether the lord by escheat will be bound by the use	75
4. Future use may be executory	<i>ib.</i>	9. He would not before the Statute of Uses, and it seems would not since	<i>ib.</i>
5, 6. Material to consider whether			

CHAPTER XIV.

OF RENTS CREATED THROUGH THE MEDIUM OF THE STATUTE OF USES.

1. As to rents <i>de novo</i> expressly authorised by statute	76	several successively, in tail there should not be several successive grants thereof	78
2. Rents <i>de novo</i> may be limited <i>in futuro</i> , if not infringing the rule against perpetuities	<i>ib.</i>	10. But a grant thereof in fee, and then an intail thereof created	<i>ib.</i>
3. Rent <i>in esse</i> not grantable <i>in futuro</i> ; but use may be declared thereof <i>in futuro</i>	77	11. Powers of distress and entry for recovery of rent	<i>ib.</i>
4. Effect of disentailing rent granted in tail, without limitation over	<i>ib.</i>	12. Grant thereof generally not necessary since Geo. II.	<i>ib.</i>
5. Effect of grant of rent for greater ownership than the grantor has in the land	<i>ib.</i>	13. But statutory powers not equivalent to conventional	<i>ib.</i>
6. Where estate in land enlarged. Rent enlarged	<i>ib.</i>	14. How these powers are limited in application thereof	<i>ib.</i>
7. No escheat of a rent	<i>ib.</i>	15. And hence expediency of a term of years by way of additional security	79
8. Rent in fee out of socage and gavelkind, lands descendible according to common law	<i>ib.</i>	16. Ejectment may be maintained by means of power of entry	<i>ib.</i>
9. Where intention to limit rent to		17. These powers pass at law with the rent	<i>ib.</i>

CHAPTER XV.

POWERS.

	PAGE		PAGE
1. Powers to give legal ownerships under the statute are future uses, and necessarily contingent until exercised . .	81	15. Contrasted instance of mortgage by such a tenant for life . .	83
2. Immaterial where powers introduced in the instrument, whether precedent or subsequent to the uses, to be defeated or postponed thereby	<i>ib.</i>	16. Effect of a mortgage where tenant for life has power to take fines, &c.	84
3. Every power is virtually a power of revocation and new appointment	<i>ib.</i>	17. Tenant for life with power of sale and exchange should not thereby defeat his own act . .	<i>ib.</i>
4. Example on the power of appointment in the usual uses to prevent dower	<i>ib.</i>	18. Where he has sold his life estate . .	<i>ib.</i>
5. Classification of powers by Lord St. Leonards	82	19. Where he has only mortgaged the same	<i>ib.</i>
6. That classification and the chapters thereon seemingly according to the law as formerly understood . .	<i>ib.</i>	20. Result of the authorities according to Lord St. Leonards as to sales or mortgages by tenant for life with power of leasing, or by tenant for life with power of sale and exchange . .	<i>ib.</i>
7. State of the law on the first publication of Lord St. Leonards' treatise	<i>ib.</i>	21. Where mortgagee of tenant for life with power of leasing or with power of sale and exchange has not stipulated against the exercise of such a power	85
8. Reasons for the modern doctrine thereon	<i>ib.</i>	22. Such a mortgagee subject to the rule <i>caveat emptor</i>	<i>ib.</i>
9. Mode of considering the liability of powers to destruction, suspension, or release	<i>ib.</i>	23, 24. Reasonable implied effect of his non-stipulation against the exercise of the power	86
10. Every competent person may release or extinguish a benefit for himself under an ownership or power	83	25. No substantial injustice if the powers exercised where no stipulation to the contrary . .	<i>ib.</i>
11. But cannot derogate from his own act	<i>ib.</i>	26. Reasons for that conclusion . .	<i>ib.</i>
12. Principles since the abolition of fines and recoveries and of tortious assurances	<i>ib.</i>	27. As to registered judgments against tenant for life with power of sale and exchange . .	<i>ib.</i>
13. Intention to abandon or release a power may be express or inferential	<i>ib.</i>	28. Question thereon on sale of the late Duke of Buckingham's estates	87
14. Sale of the estate of a tenant for live with power of leasing . .	<i>ib.</i>	29. Convenient to consider the law previously to 1 & 2 Vict. . .	<i>ib.</i>
		30, 31. Examination of the law thereon	<i>ib.</i>
		32. Inclination of the writer's opinion thereon	<i>ib.</i>

CHAPTER XVI.

COMMON LAW POWERS OF SALE OR MORTGAGE.

	PAGE		PAGE
1. Every instrument in the form of a bargain and sale not within the Statute of Enrolments . . .	89	9. Bargains and sales as regards copyholds or under parliamentary powers	91
2. Common law powers of sale in devises before the Statute of Wills	<i>ib.</i>	10. Their operation	<i>ib.</i>
3. Operation of such powers . . .	90	11, 12. When heir or devisee must exercise power and mode thereof	<i>ib.</i>
4. When exercisable by the executors	<i>ib.</i>	13. Effect of death of donee of power in testator's life . . .	92
5. Executors, &c., having power but no estate	<i>ib.</i>	14. Purposes of power failing in testator's life	<i>ib.</i>
6. Distinction between bargains and sales and assurances under the Statute of Uses	<i>ib.</i>	15, 16. Consequences thereof . . .	<i>ib.</i>
7. Bargain and sale to one to the use of another	<i>ib.</i>	17. As to rents and profits until exercise of sale	93
8. The latter not secondary <i>cestui que use</i>	91	18. Preceding observations applicable to Common Law. Powers to mortgage	<i>ib.</i>

CHAPTER XVII.

OPERATION OF USES ON AN ORDINARY MARRIAGE SETTLEMENT BY TENANT IN FEE SIMPLE, OR BY TENANT FOR LIFE, WITH REMAINDER TO HIS SON IN TAIL.

1. Practical example of the operation of uses on an ordinary marriage settlement	95	7. New law introducing the protector—the aid of incumbrancers not required	95
2. Such settlement not always by owner in fee, but often by father seised for life, son in tail . . .	<i>ib.</i>	8. Benefit of the new system . . .	96
3. In the latter instance, the usual course to effect disentanglement by distinct instrument . . .	<i>ib.</i>	9. Where tenant for life has powers annexed to his estate advisable not to convey, but merely consent as protector	<i>ib.</i>
4. Practice before the 3 & 4 Will. 4, c. 74, where a recovery was suffered	<i>ib.</i>	10. Ordinary course — subject to father's life estate and attendant powers to limit according to the joint appointment of father and son, and in default thereof to father for life and son in fee	<i>ib.</i>
5. Tenant for life or his incumbrancer having the freehold must have concurred in making tenant to the præcipe	<i>ib.</i>	11. Ancient plan in default of appointment to limit to the old uses and reasons for the same . .	97
6. Inconvenience of that necessity	<i>ib.</i>		

	PAGE		PAGE
12, 13. Order of limitations in the settlement	97	28, 29. Powers of distress and entry for securing the same	101
14. The settlement exemplifies the practical application of uses under the statute	98	30. Term of years for raising jointure when in arrear	102
15, 16. As to uses until the marriage	<i>ib.</i>	31. Modern plan to limit one term for securing jointure and raising portions	<i>ib.</i>
17. Indestructibility of uses subsequent to the marriage . . .	99	32, 33, 34. Trusts thereof	<i>ib.</i>
18, 19. Consideration of means of so doing by right or by wrong .	<i>ib.</i>	35. As to raising portions	103
20. Disclaimer of grantee to uses cannot prevent their arising .	<i>ib.</i>	36. Trusts of these terms introduced generally after limitation of uses	<i>ib.</i>
21. Effect of marriage on uses .	100	37. Indemnity to purchasers and mortgagees	<i>ib.</i>
22, 23. As to estate of tenant for life	<i>ib.</i>	38. Power to change trustees . . .	<i>ib.</i>
24. As to powers limited to tenant for life	<i>ib.</i>	39. Covenants for title	104
25. Powers of sale and exchange .	<i>ib.</i>	40. Persons who may take powers .	<i>ib.</i>
26. Powers to jointure after taking wife or appoint portions .	101	41. Usual practice formerly to assign attendant terms	<i>ib.</i>
27. Jointure rent charge for intended wife	<i>ib.</i>	42, 43, 44. Technical operation of uses in settlement	<i>ib.</i>
		45, 46. The real operation itself .	105

CHAPTER XVIII.

ON MODERN CONVEYANCES.

- | | | | |
|--|------------|---|------------|
| 1. An assurance by feoffment, lease and release, bargain and sale enrolled now unnecessary . | 106 | 9. Such an instrument may still be by writing not a deed . . . | 108 |
| 2. But they are not abolished . . | 107 | 10. On bargains and sales before the Statute, or use raised for trifling consideration and a fee passed without words of inheritance | 109 |
| 3. Instances where feoffment and lease and release can be now used | <i>ib.</i> | 11. Now words of apt limitation requisite | <i>ib.</i> |
| 4. Also a covenant to stand seised . | <i>ib.</i> | 12. General analogy of interference of equity to effectuate a contract since as previously to the statute | <i>ib.</i> |
| 5. Cases where assurances that would otherwise have failed were supported as covenants to stand seised | <i>ib.</i> | 13. But a conveyance by bargain and sale enrolled, or grant, although passing the legal ownership, but not for valuable consideration, defeasible by sale of the bargainor or grantor, under the statute, | |
| 6. Instances where bargains and sales enrolled were adopted . | 108 | | |
| 7. Feoffment, lease and release, bargain and sale enrolled will soon only form arguments for analogy | <i>ib.</i> | | |
| 8. Instruments called Bargains and sales not requiring enrolment | <i>ib.</i> | | |

	PAGE		PAGE
27 Eliz. c. 4, although the purchaser have notice . . .	109	and not supportable before the 8 & 9 Vict. c. 96, as a feoffment, release, grant or covenant to stand seised . . .	110
14. This important distinction that equity would not interfere on a bargain and sale unenrolled			

CHAPTER XIX.

ON THE ORDINARY USES TO PREVENT DOWER.

1. Mystification of common sense thereby . . .	111	13. Examination of the possibility of the prior estate determining being a grantable estate . .	115
2. Reason why a widow not dowable where intervening estate of husband and his ulterior fee . . .	112	14. Semble that such estate cannot now arise . . .	<i>ib.</i>
3. The case of <i>Duncombe v. Duncombe</i> . . .	<i>ib.</i>	15. The case of <i>Collard v. Roe</i> . .	116
4. The judges there do not seem to have adverted to the reason why such intervening estate prevented dower . . .	113	16. Decision of equity judges therein	<i>ib.</i>
5. The intervening estate there ought not to have prevented dower . . .	<i>ib.</i>	17. Suggestion that the decision in <i>Mole v. Smith</i> , might have influenced the judgment in that case . . .	<i>ib.</i>
6. <i>Dormer v. Parkhurst</i> . . .	<i>ib.</i>	18. Mr. Hopley White's observation on the intervening limitation .	117
7. Submission that in fact the limitation there was in reality not vested but contingent . . .	<i>ib.</i>	19. Under the limitation to preserve contingent remainders, the concurrence of the trustees might equally have been required .	<i>ib.</i>
8. Argument for that conclusion .	<i>ib.</i>	20. Reason for the interposed estate	<i>ib.</i>
9. As to a tortious act being a natural determination of an estate for life . . .	114	21. But where a preceding power of appointment unnecessary according to <i>Ray v. Pung</i> . .	118
10, 11, 12. Suggestion in Mr. Fearn's reasoning . . .	<i>ib.</i>	22. Observation by Lord St. Leonards of inexpediency of the declaration that the wife shall not be dowable . . .	<i>ib.</i>
		23. Power of appointment advisable	119

ERRATUM.

Page 114, line 6, for "to be surrendered," read "to the owner whereof there may be a surrender."

THE LAW OF USES.

CHAPTER I.

OF OWNERSHIPS AT THE COMMON LAW, IRRESPECTIVE OF THE LAW OF USES.

1. *Mode of conveyancing at the common law. Land in possession, in remainder, or reversion.*
2. *Livery of land in possession.*
3. *Grant of land in reversion or remainder.*
4. *Writing or charter of feoffment only record of the transaction. It operated nothing.*
5. *Reasons why livery must be made, or grant take effect instant.*
6. *An intended future feoffment or grant must have left the land with the owner.*
7. *A feoffment or grant in futuro also contrary to the policy of the common law.*
8. *This is still the law.*
9. *A condition at common law could not be for the benefit of a stranger.*
10. *Jealousy against assignment of rights of entry or action.*
11. *Instances where, as the condition could not be in the first instance given to a stranger, it could not by circuitry.*
- 12, 13. *Further explanation why a grant in futuro could not be made of a reversion.*
14. *This therefore prevented an interval between a particular estate and remainder.*
15. *But a remainder could be limited in the alternative of two events.*
16. *But ad interim the fee would have remained subject to the particular estate in the owner.*
17. *This fee simple was grantable subject to the contingency.*
18. *This the doctrine of Mr. Fearne. Mr. Preston held otherwise.*
19. *As to the livery, where first estates for years, if a vested estate, to take effect in remainder. Livery to tennor.*
20. *But if the fee to be limited in contingency expectant on the term, the livery would be void. This the rule—that an estate of freehold must support a contingent remainder.*
21. *Freehold could never be put in futuro by act of the party.*

22, 23. *Mr. Fearn's and Mr. Preston's reasons.*

24. *Inconvenience of this strictness.*

25. *Which led to the continuance of uses.*

1. By the ancient Law of England, lands of which an owner was seised in possession for any estate of freehold or inheritance could only be conveyed by livery of seisin.

2. And lands whereof the owner had not the possession, but—antecedent to his ownership—whether that ownership was of the freehold or of inheritance—there was some estate in another person,—this ownership in remainder or reversion could only be conveyed by deed of grant.

3. That livery, as is well known, was typical by delivery of a turf in the field, or the key of the house, and was made generally in the presence of witnesses; but no writing was requisite for effecting or evidencing the transaction.

4. If a writing or charter of feoffment was made, but which was not essential, it was only a record of the by-gone or contemporaneous transaction, but of itself it operated nothing. If livery had been made, it evidenced the same, but if livery had not taken place, then it became an idle writing, and although professing that livery was to be made on a day subsequent, if so made on that day, the freehold would pass by the livery itself, but the preceding writing was worthless, for it could not record that which had not taken place.

5. Indeed it is obvious, that livery of seisin or a grant, must have taken effect *instantly*. In neither case could its operation be from a future day, or on a subsequent event; nor, as is the cantatum, could the freehold be conveyed or granted *in futuro*. This indeed is a self-evident proposition. Livery from a future time *would not be any*

livery until made, and the charter of feoffment, being, as before remarked, only the record of the transaction, for by itself it worked nothing. So a writing purporting to be a feoffment, which stated that A. made livery of Black-acre from the first day of the ensuing month, would be the record of nothing that was passed, but only evidence of an intention to make the livery on the day named.

6. *Ad interim*, the seisin must have remained with the intended feoffor, and if made at or before the day named would then pass from him, and then, and not before, there would be a feoffee from him. So of a grant, it is manifest that *until there be a grantee, there is neither grantor, nor matter granted*, for, apart from the doctrine of escrow, a deed of grant must take effect immediately the deed is sealed and delivered by the grantor.

7. Thus there could neither be by the Common Law of England, a feoffment nor a grant of the freehold *in futuro*; nor would the law in the case of the charter of feoffment, or the grant to one from a future day, suspend the operation of the assurance, and give it effect, by relation; for that would have put the freehold in abeyance, and leave in uncertainty who was to answer to the præcipe, the then mode of recovering a freehold estate.

8. And the law of England still so rules. A feoffment perfected by livery may yet be made, although in consequence of the enactment of the 8 & 9 Vict. c. 106, ss. 2, 3, rendering all freehold property transferable by deed, livery be not a requisite. Still, even now, a feoffment or grant to B. and his heirs *from a future day* to the use of him in fee simple, or any other uses, would be void, and the uses would not arise, for want of a seisin to support them.

9. There was also another rule of the Law of England, that a condition could not be reserved to a stranger.

Thus, if A. enfeoffed or granted to B. in fee, with a provision that in case B. did not pay to A., or to C., a sum of money, or do any act by a particular day, C. might enter; that would have been void, for it professed to defeat a prior vested fee simple and to give it to another person than the feoffor or grantor without further livery or grant.

10. There was also a jealousy of the assignment of rights of entry, or rights of action. Had the condition, in the instance just suggested, been that A. might re-enter on non-payment of the money or non-performance of the act, that would have been good; but if A. before the default had assigned to C. his right of entry—the assignment would have been void.

11. That which the law prohibited and could not be accomplished in the first instance, *per directum*—was not allowed in the latter, by circuitry.¹ But A. might have entered on B., and restored to himself the possession and seisin, and then he might have made a fresh livery to C. in fee.

12. Suppose A. to have been seised in fee simple in possession, and to have made livery of seisin to B. for life—without professing to create any further ownership; the result would have been, that B. became tenant for his life with reversion to A. in fee simple. But A. could not afterwards grant that reversion to D. from any day subsequent to the execution by him, A., of the deed of grant, or from any day after the death of B.,—for until either such day arrived there would *not be any grantee, and in reality not any grant*.

13. Should, however, A. have granted his reversion *instantly*, and not from a future day to D. in fee simple, the consequence would have been, that B. would remain

¹ But see Cholmeley's case, 2 Co. 520, noticed by Willes, J., in *Donner v. Parkhurst*, 3 Atkins, 195.

seised for life, and have D. as his reversioner in fee.¹ But, as before remarked, A. could not have granted that fee simple from a day, or on an event subsequently to the death of B., for there would not thereby be any immediate grant, grantor, or grantee, and the proposed instrument of grant would have been void ; for when B. should die and his life estate would determine, D. would not have had any right to enter until the future day arrived or event happened, and the freehold would thus have been *in futuro*. Hence the rule, that a remainder must take effect in possession, *eo instante* that the particular estate determines ; and what could not thus have been accomplished by two assurances could not be effected by one—for instance : if there were first livery to B. for life, and secondly a grant to D. from a future day after B.'s death, this attempted second assurance by grant would be void. And if by one and the same transaction there were livery to B. for his life and after his death, and one day subsequently, then to D. in fee, the proposed alienation to D. would fail ; because during the interval of the day the freehold would, after the determination of the life estate of B., be *in futuro*. The fee would remain with A.² subject to the immediate freehold in B., during B.'s life, and could only subsequently pass to D. by fresh livery.

14. If the feoffment had been to B. for his life, and after his decease then to D. in fee, in the event that he D. should outlive B. ; so that D. was not to have the remainder in fee if he did not survive B.—and his heir was not to take the remainder in his stead—there was a good particular estate to B. for life, to take effect *instantly*, and on the death of B. (the natural determination of that

¹ Attornment, which was then requisite, has been since abolished.

² Butl. Fearn, 359 ; Mr. Preston, 1

Estates, 176 ; 2 Abst. 100. 3 *ib.* 256 contends to the contrary.

estate), a good remainder in fee to D., *if then living*; but should D. have died in B.'s lifetime, then the remainder would not take effect. And A., who had retained the reversion in fee until the contingency arrived, or the heir of A., would have entered as of his former fee simple.

15. But there might have been an alternate remainder after B.'s life estate—to D. in fee simple, if he survived B., but if he did not—then to E. in fee. In such case, except it was expressly provided that E. should survive both B. and D.—then upon D.'s dying in B.'s lifetime, the fee upon B.'s death would not merely vest in E., but in E.'s heir, in case he, E., were dead.

16. In each of the cases before put of the fee simple expectant on the life estate of B., being limited in contingency, the reversion in fee simple subject to the life estate, would remain in A. the feoffor, defeasible on the contingency happening, and becoming absolute if it did happen.¹

17. This reversion in fee might in the intermediate period of the contingency happening, be by A. granted over, subject to be defeated on the contingency taking place; but even then the grant must not have been made to take effect from a day after the making thereof, or to take effect from a day or event subsequent to the death of B.

18. But according to Mr. Preston, 2 Abst. 101 *et seq.*, 1 Estates, 176, the fee in these cases would have passed from the feoffor, and he would only have had a possibility of reverter until the contingency failed, and which would not be grantable by him. Mr. Fearne's opinion is followed in the text; and seems likely to be followed—Cont. Rem. 359, Butl. Edn.

19. If the intention was not to give an immediate fee or an immediate life estate with remainder in fee simple,

¹ So Mr. Fearne held, but Mr. Preston contends contrary: *ut supra*.

but a term of years was in either case to precede, and the same was to take effect *instantly*, then the livery was made to the termor, and passed from him to the feoffee in fee, or to the feoffee for life and remainderman in fee.

20. But, where a term of years was to be first created, and—expectant thereon—the fee simple, or the freehold was to be limited, in contingency ; then the livery to the termor would not have had any effect. By his entry it is true that he would have his term—but, *ultra* that, no other person could take by the livery, either freehold or fee simple—because the contingency might never happen, and *until then there would not be any feoffee*. The result of this was, the rule, that a contingent remainder of the freehold or fee simple must have a prior particular estate of freehold, to support it.

21. By no contrivance or device could the freehold, by the act of the party, be put *in futuro*. If the feoffor did not part with the freehold, he must have retained it, and therefore if the contingency occurred before the term had expired, and the intended feoffor wished to give validity to his former proposed assurance, he must then have granted, or if the term had expired, he must then have enfeoffed with livery, the person who had been intended to take for life or in fee on the contingency. The former assurance for such purpose was nothing worth.

22. In the cases previously suggested, where the feoffor only meant to limit an estate for life, with remainder in fee in contingency, the question, as has been before adverted to, arose where the fee simple, subject to the estate for life, resided. Did it, until the contingency, remain with the feoffor notwithstanding his prior livery, or had he a mere possibility of reverter, until the contingency was decided—to cease if the event happened—or to become an estate in fee simple, if it did not occur.

23. Or, was the fee simple, *ad interim*, in abeyance. Mr. Fearne contended powerfully that the fee simple in the meanwhile remained in the feoffor. Mr. Preston, as before observed, thought contrary.

24. It is evident that under a system whereby, except partially, by some local custom, there was not any right to substitute, by a man's last will and testament, an owner instead of an heir, or to provide for younger children, or to pay debts—there was that pressure of inconvenience which, being of perpetual recurrence, would induce contrivances to evade such restrictions.

25. Few could present themselves more readily than a conveyance to a friend, in confidence, that he would deal with the property conveyed, as the feoffor or grantor should desire, either as designated or named in the instrument of conveyance, or to be named or designated hereafter by writing or will, and in the meanwhile, permit the feoffor or grantor to take the profits.

CHAPTER II.

OF USES BEFORE THE STATUTES RELATING THERETO.

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| <ol style="list-style-type: none"> 1. <i>Introduced by the clerical chancellors for the Church. Application thereof ignored at law.</i> 2. <i>Properties of the use. Mere right an assignable fee, without words of limitation, not escheatable or forfeitable, except by express enactment devisable.</i> 3. <i>Instance and effect of its operation.</i> 4. <i>Under covenants to stand seised.</i> 5. <i>Implied under contract by bargain and sale.</i> 6, 7. <i>Unlimited nature thereof. Subsequent alteration.</i> 8, 9, 10. <i>Nature and property of the use did not charge the land, but affected the owner with privity.</i> | <ol style="list-style-type: none"> 11. <i>Privity of estate.</i> 12. <i>Privity of person touching the estate.</i> 13. <i>Rightful ownership. Nature of use. Purchaser for value without notice.</i> 14. <i>Persons not bound by the use. Disseisins, &c.</i> 15. <i>Lord by escheat. Tenant by curtesy in dower.</i> 16. <i>Purchasers for valuable consideration without notice of the use.</i> 17. <i>Interference of the Court of Chancery.</i> 18. <i>Where it would not interfere.</i> 19. <i>Inconvenience of this divergence of legal and equitable ownership.</i> |
|--|---|

1. THE ecclesiastics, from whom the Chancellors were chosen during the sway of the Plantagenets, had, for evading the law against alienations for religious or pious purposes, borrowed from the Roman law the system of uses ; and although defeated by the vigilance of king and barons from thereby obtaining for the Church the large possessions which they coveted, they countenanced the device for acquiring many facilities which were denied by the common law ; but the use thus introduced by them was ignored by the judges.

2. The use gave no estate. It was a mere right enforced in some instances, but not in others, as will be hereafter noticed. It was assignable by writing, which a right, with the exception of an *interessi termini* was not. The fee could be taken in the use without words of inheritance if a full consideration were paid. It did not escheat—it was not forfeitable for treason or felony—except by particular statutes. It was devisable, and even if the feoffment was to such uses, as a feoffor by will should appoint, he might have disposed of the use, by a nuncupative will.

3. If therefore A enfeoffed B in fee simple, to such uses as A should appoint, A might by any writing to take effect *inter vivos*, or testamentary, have appointed the use—and B and his privies in estate would have been bound to conform to the use—to have allowed the appointees thereof to receive the rents and profits, and to have made such conveyances as might be authorised by the owner-ships appointed,—and until appointment, B must have permitted A to receive the rents and profits, and upon A appointing to himself—to have reconveyed to him the fee. If he died without appointment, then B would have been compelled to allow the heirs of A to receive the rents and profits, or to make such conveyance as they should direct.

4. But, it was not only upon a conveyance by feoffment or grant where the seisin was passed to the feoffee or grantee, that uses took effect, for they might have arisen by *construction* of the Court of Chancery, upon the seisin *retained* by the author of the use, as on a covenant to stand seised, where the frame of the instrument showed that the legal ownership was to be *retained*.

5. So, also a use might have been *implied* under the doctrine of the Court of Chancery, as where a man had

bargained and sold lands for a valuable consideration, being equivalent to a contract for sale at the present day, Chancery would not allow the bargainor or contractor to avail himself of his own wrong by omitting to make a conveyance according to his agreement, and therefore would not only decree the conveyance, but also that the bargainee should have the use of the land or pernaney of the rents in conformity to the contract.

6, 7. And this bargain and sale need not have been in writing, it might have been merely oral or evidenced by parol testimony, so that a use might then have arisen by word of mouth until the Statute of Enrolments after noticed. Indeed a mere writing and not a deed was required by the Statute of Frauds for a feoffment; a deed was not necessary for that assurance, until the 8 & 9 Vict. c. 106, s. 3. So that a use by mere writing was effectual on such an assurance previously to that statute.

As before adverted to, it was not absolutely necessary for creating a fee in a use that words of limitation should be employed, the contract was virtually for the fee simple, if not restricted.

8. The *cestui que* use had not, as previously mentioned, before the statute 27 Henry VIII., in the language of the books, either *jus in re* or *jus ad rem* in the land; that is, he had not any legal estate, right or interest in, to or out of the land. His ownership was not recognised by the Courts of law. If he entered on the land, he might, should the person seised to the use so will, be treated as a trespasser,—neither wife, nor husband, of the *cestui que* use was entitled to dower or curtesy. There was not, as before observed, any escheat, nor incident of tenure applicable to the use.

9. But although the feudal consequences of tenure did not attach on the interest of *cestui que* use, yet by express

parliamentary provision, some of them were impressed on his ownership, and the nature and quality of the use in several respects partook of those of the land; for instance, the use was in process of time held to be descendible according to the rules of common law; or even of a peculiar custom, as Gavelkind, or Borough English, and by the better opinion, was subject to the *possessio fratris*, in exclusion of the half blood, and was devisable, whether the lands as to which the same existed, could or could not be given by will.

10. The use, as before remarked, did not charge the land like a rent or condition into whosoever hands the same should pass, but only affected the legal owner of the land where he had privity of estate with the first feoffee to uses, and there was also privity of person touching such estate.

11. *Privity of estate*, was where a legal ownership was rightfully derived under, or merely by force of the act of the person originally seised to the use or claiming through him—all such parties in technical language were stated to come, *in the per*.

12. *Privity of person*, touching the estate was where the person who had subsequently become seised of the lands acquired the same under an express or implied contract, that he would exercise the use. Every person therefore who took the land for a rightful ownership through the act of any party who then stood seised to the use, and so took *with notice of the use*, was considered as charged with the confidence—and every person who took the land in like manner *without any notice of the use*, but had not paid *any valuable consideration* for the same, was considered as only coming in the place at law of his feoffor, &c. and as not having any original equity of his own, and therefore holding to the former use.

13. Where the estate of the feoffee to the use devolved on his heir, the latter took his estate charged with the confidence. So also did the alienee *without value, with or without notice of the use*, for he had no superior equity over the *cestui que use*; but if the alienation was *for value, and without notice*, then such alienee held discharged from the use,—a rule that obtains at the present day, since relief is never given in equity against a purchaser for valuable consideration without notice.

14. There were before the Statute of Henry VIII. three classes of persons whose legal ownerships were not affected by the use.

First. Persons coming in of a *wrongful* ownership and not taking through, but adversely to the seisin of the person who stood seised to the use, as a *disseisor, abator, &c.*

15. *Secondly.* Persons claiming rightfully and consistently with the seisin of the party who stood seised to the use, but not merely taking under his act, but coming in by a *consequence of law*, as the lord by escheat, tenant by curtesy, and tenant in dower.

No declaration or limitation could exclude the attachment of these incidents to, or ownerships on a fee simple estate, and that which could not be effected directly could not indirectly. If the fee could not be limited to one and his heirs, and if he died without heirs, then to another—or a fee could not be limited to a woman with a declaration that there should not be curtesy of the same, or could not be given to a man, negating the attachment of dower, so neither of these consequences or results could be effectuated or obtained *by such a declaration of use*—as, that A. and his *heirs* should stand seised to a use, and if A. failed of heirs, that some other person should stand seised, or that the land should go as directed by the *cestui que*

use—so a like declaration would not bind the tenant by curtesy or in dower.

16. *Thirdly*. Persons taking *rightfully* and not by disseisin, the ownership of the parties standing seised to the use, but acquiring the same without *any notice of* the use, and having paid a *valuable consideration* for the land. In such a case, as there was not any notice of the use, so there could not be any *express* contract to stand seised to the use, nor could any such contract be *implied*, because that implication would have been repugnant to the essence of the law—as a party paying a valuable consideration for the lands, must naturally be considered to have contracted for the rents and profits to his own use.

17. But although *cestui que* use was without right or remedy at the common law, the Court of Chancery, by writ of subpoena, would have compelled the feoffee, or bargainor, or covenantor, to perform the use wherever it was expressly declared on a feoffment, or grant in fee, or it arose on a bargain and sale, or covenant to stand seised, or it resulted on a feoffment in fee.

18. The Court would not interfere where an express use was declared on any subinfeudation in tail, for life, or years which raised a tenure and imported a consideration incompatible with a use ;—nor would it imply or construe a use in favour of a mere volunteer, who had been an entire stranger to the estate, who had not given or rendered money, or money's worth, or any return, or rent ; but any consideration of such sort, however trifling, would have given a right to the use. So had a person covenanted to stand seised of lands in favour of another, Chancery would not have compelled the covenantor to allow the covenantee the pernaucy of the profits, except where the consideration of blood or marriage existed ; but if such Court found a use *expressly created*, although no con-

the doctrine still prevails, since a Court of Equity, although it will not interfere to perfect settlements or assurances made in favour of volunteers, yet if a trust be declared, will execute the same although no consideration proceeded from the *cestui que* use.

19. This separation of the legal dominion and the beneficial ownership occasioned many mischiefs and inconveniences. They have been repeatedly referred to by text-writers, and it would be needless to reiterate them. They are sufficiently adverted to in the preamble to the Statute of Uses after noticed.

CHAPTER III.

THE STATUTES OF USES.

1 RICHARD III.

THE principal statute applicable to uses previously to the statute 27 Henry VIII., was that of 1 Richard III., and which enabled *cestui que* use to make legal assurances according to the quantum of the use, in like manner as the feoffee to the use could have done. But in consequence of this Act not taking away from the feoffee his capacity of also effecting legal assurances, the statute introduced a further mischief, by enabling conflicting conveyances from the feoffee to use, and from the *cestui que* use, and its operation was considered as only extending to the acts of the *cestui que* use in fee, and not to those of *cestui que* use for any less interest which did not arise out of a seisin in fee, although it enabled *cestui que* use in fee not only legally to alien in fee, but also to convey in tail for life or years.

27 HENRY VIII. CAP. 10.

This, commonly called the Statute of Uses, after reciting that by the common law, lands were not devisable by testament, nor ought to be transferred but by livery and seisin, matter of record, &c., yet nevertheless divers and sundry imaginations, subtle inventions and practices had

been used whereby the hereditaments of the realm had been conveyed by fraudulent feoffments, fines, recoveries, and other assurances, and also by wills and testaments, by reason whereof heirs had been unjustly disinherited, the lords had lost their wards, marriages, reliefs, heriots, escheats, aids, &c., married men had lost their tenancies by the curtesy, widows their dower, and manifest perjuries were committed. It is therefore among other things enacted: (S. 1.) "That where any person or persons stand or be seised or at any time hereafter shall happen to be seised of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner or means whatsoever it be, that in every such case all and every such person and persons and bodies politic that have or hereafter shall have any such use, confidence, or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust in remainder, or reversion, shall from henceforth stand and be seised deemed and adjudged in lawful seisin, estate and possession of, and in the same honors, castles, &c., to all intents, constructions and purposes in the law of, and in such like estates as they had or shall have in use, trust, or confidence of, or in the same, and that the estate, title, right, and possession, that was in such person or persons that were or hereafter shall be, seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, be from henceforth clearly deemed and adjudged to be in him or them, that have, or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust, that was in them.

“That where divers and many persons be, or hereafter shall happen to be, jointly seised of, and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised, that in every such case those person or persons which have, or hereafter shall have, any such use, confidence, or trust, in any such lands, &c., shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have, any such use, confidence, or trust, such estate, possession, and seisin of, and in the same lands, &c., in like nature, manner, form, condition, and course as he or they had before in the use, confidence, or trust, of the same lands, tenements, or hereditaments, saving and reserving to all and singular persons and bodies politic, their heirs and successors other than those person or persons which be seised, or hereafter shall be seised of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action, as they or any of them had or might have had before the making of the Act.

“And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be, seised to any use all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of them might have had to his or their own proper use in or to any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be, seised to any other use, as if this present Act had never been had nor made, anything contained in this Act to the contrary notwithstanding.

“That where also divers persons stand and be seised of, and in any lands, tenements or hereditaments in fee simple or otherwise, to the use and intent that some other

person or persons shall have and perceive yearly to them and to his or their heirs, one annual rent of £ or more or less out of the same lands and tenements, and some other person one other annual rent to him and his assigns for term of life or years, or for some other special time according to such intent and use as hath been heretofore declared limited and made thereof."

It was therefore enacted that in every such case, the same persons their heirs and assigns that had such use and interests to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them their heirs and assigns should be adjudged and deemed to be in possession, and seisin of the same rent of, and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made or executed to them by such as were or should be seised to the use and intent of any such rent to be had, made or paid according to the very trust and intent thereof, and that all and every such person and persons as had or thereafter should have any title, use and interest in or to any such rent or profit, should lawfully distrain for nonpayment of the said rent, and in their own names make avowries or by their bailiffs or servants make conusances and justifications, and have all other suits, entries and remedies for such rents as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry or otherwise according to such conditions, pains or other things limited and appointed upon the trust and intent for payment or surety of such rent.

CHAPTER IV.

THE STATUTE OF ENROLMENTS.

27 HENRY VIII. CAP. 16.

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| <p>1. <i>The Statute of Uses executed every use, whether on a bargain and sale or covenant to stand seised, or conveyance operating by transmutation of possession.</i></p> <p>2. <i>But as bargains and sales were contracts, and might be merely oral, there would thereby have passed an</i></p> | <p><i>estate without deed, livery, or attornment.</i></p> <p>3. <i>Reason, therefore, for the Statute of Enrolments, and summary of its enactments.</i></p> <p>4. <i>Covenants to stand seised, necessarily being by deed, not within the mischief of the statute.</i></p> |
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1. THE Statute of 27th Henry VIII. executed every use without regard to the *mode* by which the same arose, and thus a bargain and sale and a covenant to stand seised became by force thereof conveyances. Assurances operating through the Statute of Uses, became thenceforth divisible into conveyances operating by transmutation of possession, and conveyances not so operating. The bargain and sale and covenant to stand seised formed the latter.

2. But inasmuch as at the time of the enactment of the Statute of Uses, a contract for or bargain and sale of lands need not have been in writing, but might have been by mere word of mouth, and as a use could have arisen on such oral bargain and sale, in consequence of the statute which would have passed the seisin to the use, however it arose ; the result would have been that lands might have

been transferred in fee without the evidence of a written contract or the solemnity of livery or attornment.

3. To obviate this inconvenience, the Statute 27th Henry VIII., commonly called the Statute of Enrolments, was passed, whereby it was enacted, "That from the 1st day of July 1536, no manors, lands, tenements, or other hereditaments should pass, alter or change from one to another, whereby any estate of *inheritance or freehold* should be made or take effect in any person or persons, or any use thereof to be made by reason only of any bargain and sale thereof, except the same bargain and sale were made by *writing* indented, sealed and enrolled in one of the King's Courts of Record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold were, before the *custos rotulorum* and two Justices of the Peace, and the Clerk of the Peace of the same county or counties, or two of them at the least, whereof the Clerk of the Peace to be one, and the same enrolment to be had and made within six months next after the date of the same writings indented."

4. But covenants to stand seised were not comprehended by this Act, by reason that a covenant being necessarily by deed, the mischief to be obviated did not exist on such assurances.

CHAPTER V.

ON THE SCOPE AND EFFECT OF THE STATUTE OF USES.

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| <ol style="list-style-type: none">1. <i>First impression of the Judges that uses were to be extinguished, but corrected on subsequent consideration.</i>2. <i>Instances where uses were annihilated.</i>3. <i>The statute does not give larger legal estate in the use, than there is seisin to supply same.</i>4, 5. <i>Instances thereof.</i>6. <i>Uses not executed on a possession for years.</i> | <ol style="list-style-type: none">7. <i>But a term of years raisable by limitation of use.</i>8. <i>Privity of seisin to the use. No use upon use.</i>9. <i>Instances thereof.</i>10. <i>Bargain and sale to one to the use of another.</i>11, 12. <i>Consequences of inattention to the rule, that there cannot be a use of a use.</i>13. <i>Further instances thereof.</i> |
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1. THE Common Law Judges were naturally inclined, soon after the Statute of Uses, to consider that the object of its enactments was to extinguish uses altogether, and there certainly is, on a general view of that subject, an indication of such intention, particularly when we recur to the inducements for the statute set forth, in its preamble. But more enlarged notions prevailed, particularly when the language referred to by Lord Bacon where any person is or *hereafter* shall be seised to any use is considered, and also where the passage in the 12th sect. of the statute, that the king should take the feudal profits for all uses which became executed by the statute after the 1st of May, 1536, and when other parts of the Act came to be considered.

2. The effect of the statute, however, was to annihilate

uses in every instance where there should be a seisin in fee simple (or, although this was doubted, in fee tail), or for life to the use of any other person, for any ownership commensurate with, or less than, but not exceeding the quantity of estate in the seisin to the use—and where the *cestui que* use was to take for a *present* and *vested* ownership.

3. But the statute did not give to the *cestui que* use any greater legal estate than was vested in the feoffee or releesee to the use.

4. As, suppose A. seised *for life only*, had by lease and release or other *rightful* assurance, assumed to convey to B. in fee, to the use of C. in fee ; here, as A. could rightfully only pass his life estate, although professing to convey to B. in fee, the latter could take no more to the use declared than the seisin during the life of A. The legal ownership, therefore, transferred from B. by the statute to C., the *cestui que* use would be only an estate to him for the life of A.

5. So, even if A. had been seised in fee simple, but had conveyed to B. and his *assigns*, to the use of C. his heirs and assigns for ever. Here, as B. could not, for want of words of inheritance, take any greater seisin than for life, so C.'s estate, by force of the statute, would be for life only and not in fee.

6. In consequence of the statute having provided only that uses should be transferred into legal ownership, where there was *seisin* to the use, and not extending to cases where there was a *possession* to a use, as where termor for years had declared himself *cestui que* use thereof, in favour of another, the use of this chattel interest was not executed into legal estate by this statute. Except therefore by the help of the statute 1 Richard III. a *cestui que* use of the term had not any means of passing

the legal estate thereof to another, without the assistance of the person standing legally possessed thereof to the use expressed.

7. But although the statute did not execute into legal estate the use declared on an existing term of years, still, as was familiar in the instance of the *ci-devant* bargain and sale or lease for a year, it enabled a person to create *at law* a term of years, by force of its operation, without entry. Indeed the statute expressly provides for the case of one person being seised to the use of another for years.

8. The construction of the statute by the Judges was, that it had operation only where there was immediate privity between parties, and its effect was denied more than once on the same assurance. Where, therefore, a use was declared upon a use, the secondary use, remained a mere equitable interest, as it was previously to the statute.

9. If, therefore, A. seised in fee simple, conveyed to B. in fee, to the use of C. in fee, *to the use of D. in fee*, the confidence or privity existed in the first instance, between B. and C., and then between C. and D. ; but, on account of the intervention of C., there was not any direct use, trust, or confidence, between B. and D. ; and B. could not be said to be seised to the use of D. Admitting, therefore, that the statute could in this particular instance supply only *one* conveyance, that necessarily must have been on the seisin as between B. and C., or subsequently between C. and D. But it is obvious that for giving a legal ownership to D., it could not operate between C. and him ; because C. did not take any seisin, but only a use by the original form of the conveyance, and C. could not acquire the seisin, save by force of the statute, which when it had divested the seisin from B. to him, was deemed *functus officio*. So, in order to pass the legal ownership thus

acquired by C. from him to D., there must have been a *new conveyance*, and meanwhile he stood in the capacity of a trustee to make that conveyance and was bound *interim* to allow D. to have the rent or profits.

10. And again, if A. bargained and sold to B., to the use of C.—B., previously to the statute, could not have had any seisin by the mere force of the contract, or bargain and sale, but must have obtained the same under a conveyance, voluntarily or compulsorily, from A. ; yet although previously to the statute, he had not any *legal* ownership, still if the bargain and sale, were for *valuable consideration*, he would in the contemplation of a Court of Equity, have been entitled to the use of the lands, and the statute finding him so entitled, to the use thereof, would have supplied the conveyance from A. to him. But *there* its operation would cease, and if C. were desirous of having the legal ownership intended in his favour, he must have obtained a conveyance thereof from B.

11. The want of attention to this rule, that the statute will supply but *one* conveyance, and does not execute a use *upon a use*, often occurs on the exercise of a power of appointment. As, for instance, on dealing with the power preliminary to the ordinary uses to prevent dower, where there has been a conveyance to A. and his heirs to such uses as he shall appoint, and in default of and until such appointment, to his use for his life, with a limitation to the use of a trustee during his life in trust for him, with the ultimate use to him the grantee in fee. Here by the express form of the conveyance, the uses so declared in favour of A. and his trustee, are only to take effect in the meanwhile until other uses are declared ; but, when such other uses are so declared, then to the extent of that declaration, the uses to take effect in the meanwhile are driven out, and the uses under the appointment take

effect instead, in like manner as if they had been originally declared.

12. Now, upon the principle of the case put in a former paragraph, of a conveyance by A. to B. in fee to the use of C. in fee to the use of D. in fee, the statute would have operated but once, and having passed A.'s seisin to C. (the first *cestui que* use in fee) would have left the legal ownership with him ; and to have passed such ownership to D. there must have been a new conveyance. D. in the meantime would have the like use as every *cestui que* use had previously to the statute—in other words a trust cognisable only in the Court of Chancery.

13. If, therefore, in the original frame of the conveyance a use could not be limited on the seisin, first for C. in fee and then for D. in fee, so as to give the legal ownership to the latter, it is manifest this could not be accomplished under a *power* to designate a future *cestui que* use ; for it will be seen in section 11, that the conveyance was to A., the grantee in fee, giving him thereby the common law seisin to the use of such persons as he should appoint, and in the meantime to the uses there expressed in favour of himself and his trustee. A. had thereby the power of appointment or right to designate a person to take *the use*, and when he so nominated, the person nominated became *cestui que* use, as if originally named in the deed creating the power, and the seisin was thereon transferred by the statute to such appointee. But if A., the person who had such right of nominating a *cestui que* use, should have appointed to B. in fee to the use of C. in fee, he thereby would have made B the *first cestui que* use, who by reason thereof would have obtained the *legal* ownership, whilst C. the second *cestui que* use had only a secondary use or trust ; and C., to clothe it with the legal ownership, must obtain a conveyance thereof from B.

CHAPTER VI.

DISTINCTION ON OWNERSHIPS BEFORE AND AFTER THE STATUTE.

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| <ol style="list-style-type: none"> 1. <i>Preliminary inquiry.</i> 2. <i>Rules at the common law irrespective of uses.</i> 3. <i>Seven examples of these rules :—</i> <ol style="list-style-type: none"> (1.) <i>Freehold could not be placed in futuro.</i> (2.) <i>Livery or grant defeasible only by condition.</i> (3.) <i>Condition must have defeated whole estates conveyed.</i> (4.) <i>Benefit of condition could not be for strangers.</i> (5.) <i>No feoffment or grant to wife.</i> (6.) <i>Grantor could not take a particular estate.</i> (7.) <i>Could not make his heir a purchaser.</i> 4. <i>Reasons for or causes of 1st, 2nd, 3rd, and 4th rules.</i> 5. <i>As to 5th rule.</i> 6, 7. <i>As to the 6th rule. Discussion on policy of the rule.</i> 8. <i>Analogy to rule in Shelley's case.</i> 9. <i>Reasons for the same.</i> 10. <i>Mode by which a heir might take by purchase, by feoffment, and re-infeoffment, &c.</i>
<i>This circuitry needless since the Statute of Uses.</i> 12. <i>Alternative in the law that heir might take as purchaser, by 3 Will. 4, c. 106, s. 3.</i> 13. <i>Main object of the Statute of Uses, and new results thereof.</i> | <ol style="list-style-type: none"> (1.) <i>May be use of freehold in futuro.</i> (2.) <i>One estate defeasible by another.</i> (3.) <i>Priority of estates may be charged.</i> (4.) <i>Persons taking it several times may be joint-tenants.</i> (5.) <i>Estate of freehold may determine with ut entry.</i> (6.) <i>New estate descendible as land of which use determined.</i> <i>Explanation of last proposition.</i> 14. <i>Cestui que use before statute had, no legal right in or to land.</i> 15. <i>No escheat of use, but of land before statute.</i> 16. <i>No necessity to construe uses before statute, according to the rules of tenure.</i> 17. <i>Nor why the trustee to the use should not have dealt with the land according to the use declared.</i> 18. <i>As to descent of use.</i> 19. <i>Difficulties of the common law Judges on applying the pre-existing rules of tenures to uses after the statute.</i> 20. <i>Scope of 2nd section of the statute.</i> 21. <i>How applied by the Judges</i> 22. <i>Difficulties as to the new ownerships.</i> 23. <i>Result of their decisions seemingly perplexed in result, but inevitable.</i> 24. <i>The duty of the Judges in construing such new ownerships.</i> |
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| <p>25. <i>And hence the double system of common law and statutory ownerships.</i></p> <p>26. <i>Introducing conditional limitations, springing uses, &c.</i></p> <p>27. <i>The conduct of the Judges discreet.</i></p> <p>28. <i>Perpetuities avoided by construction of conditional fees, but enacted by the Statute de Donis.</i></p> <p>29. <i>Effect of Taltarum's case. Strictly no perpetuity at the common law.</i></p> | <p>30. <i>Such at least the opinion of Lord St. Leonards and Mr. Preston. Doubt of Mr. Lewin.</i></p> <p>31. <i>The Judges adhered to the rules of the common law where possible. Contingent remainders, conditional limitations.</i></p> <p>32. <i>Rule against perpetuities applied to springing or future uses and conditional limitations.</i></p> |
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1. IN order to obtain a clear, and scientific knowledge of the operation of the Statute of Uses, it is necessary not only (as previously has been attempted) to consider the legal ownerships that existed before the introduction of uses, but also those which were consequent upon, or the result of that statute.

2. In the first place it may be not amiss to recapitulate, the rules or principles of the Common Law irrespective of uses.

3. They were,

- (1.) That the freehold could not be put in *futuro*.
- (2.) That livery or grant once made, could not be defeated during the existence of the estate limited, save by a condition in favour of the feoffor or grantor, or his real or personal representatives according to the ownership.
- (3.) That the condition must defeat the entire estate, except when annexed to a lease for years.
- (4.) That the benefit of a condition or a right of entry or action, could not be given reserved or assigned to a stranger.¹
- (5.) That a man could not enfeoff or grant to his wife, Litt. sec. 168, Co. Comment. 112 *a*, neither could the wife alien to her husband, Co. Litt. 187.

¹ But see Cholmeley's case, *ut ante*.

(6.) That he could not have an estate of his own grant, or in other words, that he could not take a particular estate as contradistinguished from a reversion by force of his own feoffment or grant.

(7.) That he could not make his own heir a purchaser.¹

4. The above propositions are in some instances positive rules of law ; in others, they are only deductions from prior fixed principles.

5. The first, second, and fourth of these rules have already been observed upon. The third rule would prevent a new estate for a partial interest being created *thereafter*, without livery or grant.

The fifth rule is the result of the unity in person of husband and wife in contemplation of law ; so that if lands be limited to husband and wife and another, as tenants in common, the husband and wife take as tenants by entirety one moiety, and their co-tenant, the other moiety, or if the alienation should be in joint tenancy—the husband and wife, or the survivor of them, will have the *potestas alienandi* of one moiety—and the co-joint tenant of the other moiety, and on the death of husband or wife, the survivor of them would hold jointly with the other joint tenant, if then living.

6. The sixth rule in one sense is a self-evident proposition, and otherwise the result of a fixed rule of law. There could not be any heir of a living person, and consequently a man could not enfeoff or grant directly to his heir, as there would not be any person to take the livery or grant. It is true that he might enfeoff or grant to his eldest son in contemplation of that son becoming his heir, but this would not be the intention, for the eldest son might make an instant alienation, whilst the design of the feoffor or grantor would be, that there should not be any

¹ 1 Prest. Estates, 154.

alienation *until his own death* ; and the object being that a son dying in his lifetime should not take, but that a grandson or other person who might answer the description of heir at the ancestor's death should then first take.

7. Or if the livery or grant were made to one for life, and after his decease then to the heir of the feoffor or grantor, if that were allowed, it would be a contingent remainder, which might be destroyed by the aid of the tenant for life, and then the feoffor or grantor would have back the estate.

8. And this is the principle of the rule in Shelley's case, as explained by Mr. Fearne,¹ that if the limitation were a contingent remainder, "the ancestor might, in many cases, have destroyed it for his own benefit, if occasion had called for it ; if not, he might have let it remain to his heir in as beneficial a manner as if it had descended to him ; at the same time that the lord would have been deprived of those fruits of the tenure, which would have accrued to him upon a descent. So that under such a construction, the ancestor would have had all the power over the estate which he would have had over a vested inheritance ; and if he were not inclined to use that power, his heir would have taken the estate as fully as by descent, without the feudal burdens to which he would have been liable, in consequence of a descent."

9. The policy of the law would not allow a person to take lands as a purchaser in his own right, with all the benefits of a descent from his ancestor without the burthens.

10. It is true that by means of a feoffment and re-enfeoffment, a grant and re-grant, or, as to a feme covert, by a fine *sur grant et render*, the original feoffor or grantor might circuitously cause a remainder to his right heirs, but there the limitation would not be to the heirs of the feoffor or

¹ Cont. Rem. 83.

grantor on his or her own assurance, but to the heirs of the re-enfeoffor, or grantor, or renderor, and no rule of law would be violated.

11. But subsequently to the Statute of Uses the like operation might be obtained by a declaration of uses on a feoffment, grant, or fine, and the circuitous mode became obsolete. All this could thereby be accomplished with much greater facility, with the exception that the course of descent, if the original feoffor had been seised in fee *ex parte materná*, any estate in fee simple to be retaken by him, or her, or his, or her heir under the reassurance, would as a new purchase become descendible to the heirs, *ex parte paterná*, but on a mere declaration of use the descendible quality to the heirs on the part of the mother would remain.¹

12. But now by 3 William IV. c. 106, s. 3, it has been enacted that, "when any land shall have been limited by any assurance executed after the said 31st day of December, 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

13. The great object of the Legislature in passing the Statute of Uses was, as is evident from the recitals, to convert the ownership of the *cestui que use* into an estate in the land with all those qualities which, prior to that statute, were annexed to the ownership under the use. This is a proposition to be always kept in mind as accounting for any distinctions by which estates arising from uses are governed by rules different to those which prevailed at the Common Law. Among them :—

¹ *Price v. Langford*, Salk. 337.

- (1.) That the first use may give a freehold *in futuro*.
- (2.) That one estate may be defeated by another estate.
- (3.) Or the order of priority be changed by shifting uses, or by powers.
- (4.) That several persons taking at different times may be joint-tenants.
- (5.) That estates of freehold may cease *ipso facto*, by means of conditional limitations without entry or claim.
- (6.) That the new estate shall be governed in its descent by the right of succession, by which the land would have been regulated.

The last-mentioned propositions are in contradistinction to those which existed at the Common Law, and on which comment has already been made.

14. As will be more fully observed upon hereafter, a use or trust depended on personal confidence, and rested on privity. The *cestui que* use had neither right in or to the land, and the use was in no sense deemed the land by courts of law.

15. There could not be any escheat of the use, for a mere confidence between individuals did not lie in tenure, besides the trustee to the use had the land—it might escheat from him for default of heirs, and the lord would hold discharged of the use ; but whilst there was a person so seised to the use the lord had a tenant, and there was not any ground for the escheat by death without heir of *cestui que* use in fee.

16. There was not any motive for the Chancellor to mould or construe the use generally according to the laws of tenure. In fact it was to evade the strictness and inconveniences of these rules, that uses, if not originally devised, were afterwards applied.

17. Nor was there any reason why the trustee of the land should not be entrusted with, or exercise a confidence over the freehold of the land from a future day ; or that if he engaged to hold to the use of A for his life, he should not undertake a trust to permit B after his return from Rome (although A were then living) to take the rents—or if he held to the use of A in fee, that he might not undertake a confidence for B and his heirs by way of substitution in case B paid a sum of money or, on the happening of any given event—or, that he should not undertake to hold for a class of persons, although they might come into existence or be ascertained from time to time, or even after some of the class had become entitled to possession under the use.

18. It is true that the use became descendible to the heir who would have inherited the land of which the use was declared, and the reason of that is obvious. If the confidence was not to determine with the life of *cestui que* use, but was to be holden for his heirs—that in inception was a descendible use, and as the word “ heir ” is not merely a personal term, but also relative to the land to be inherited from the ancestor, or by the customary heir, should the land of which the use was declared have been at law descendible in a customary manner ; it was equitable and just for the Chancellor to consider who was meant to take—whether the heir by the common law—or a special heir by the custom—and if the land would have devolved to the latter, then to select that heir. So that an effect was caused, which produced the rule that the descent of the use was governed by the descent of the land, whether at common law or by custom.

19. After the Statute of Uses, when the Common Law Judges had to determine upon the application thereof to legal ownerships, and when they found this divergence of rules or maxims governing the land at Common Law, and

the Court of Chancery in construing uses, they could not set at nought the provisions of the statute.

20. The 2nd section of that statute enacted that *cestuis que* use should be adjudged in lawful seisin estate and possession to all intents, constructions, and purposes in the law, of and in such like estates as they had or should have in use, trust, or confidence,—and that the estate, title, right and possession, that was in such person or persons that were, *or thereafter* should be seised to the use, confidence or trust of any such person or persons or any body politic, should be thenceforth clearly deemed and adjudged to be in him or them, that had *or thereafter* should have such use, confidence, or trust, after such quality, manner, form and condition, as they had before in or to the use, confidence, or trust that was in them.

21. The Judges considered that the statute was not passed to alter generally the tenure of lands or the rules of assurance,—but only to convert uses into legal ownerships, but imbued with the prior quality of the use, held that the rules of the Common Law remained. Therefore, where the statute supplied a conveyance, they deemed it to have the same effect, as if no statute had been passed—but the trustee to the uses had, in consonance to his engagement, made such conveyance. They determined that the legal ownership so acquired should be governed by the rules of the common law, if the same would have applied to a conveyance so actually made. Nor in this did they disregard any injunction of the Legislature, but arrived at a logical and rational conclusion.

22. But when they had to consider cases where uses had been declared or arose that indicated ownerships, the efficacy or validity whereof was denied by the Common Law, then their difficulty began.

23. The result of their decisions may have produced a

seemingly perplexed and unnatural system, but it appears to have been an inevitable necessity.

24. The Judges were bound to obey the Legislature, and consequently, to construe the legal ownership acquired by *cestui que* use, as having the same qualities and for the like estates and ownerships as he had in the use. This required them in some instances to interpret the legal ownerships thus conferred or acquired as being of a different quality to what previously existed.

25. Hence then the double system—the conveyance pure and simple at the Common Law—and the mixed effect—partly operating at the Common Law—partly by the statute.

26. This induced conditional limitations, shifting and springing uses, and the various contrivances operating on the legal ownership so usual in settlements but denied by the simplicity of the Common Law.

27. The Judges however, did not run wild in their construction. Their predecessors had for centuries favoured alienation. It is true that the rule against perpetuities according to the fixed period now existing, did not exist, but the capacity of Common Law alienation furnished the boundary for that rule.

28. When conditional fees existed previously to the Statute *de Donis*, the Judges had, certainly with violence to the literal expression, decided that a gift to a man and the heirs of his body was a fee simple, on condition that he had such heirs—so that he might alien even previously to the birth of issue, and the alienation prevailed if issue afterwards came into existence. This contravened the wishes of the barons, and the Statute of Westminster, 2 Edw. I. c. 1 (often denominated the Statute of Great Men), was passed, and directed that the will of the donor should be observed—that the heirs of the body

named should inherit—and that on their failure the lands should remain or revert—thus introducing in lands and tenements the estate tail, the remainder in tail or in fee, and the reversion in fee.

29. Up to the 12th year of Edward IV. the perpetuity of estates tail existed, when Taltarum's case established the bar by common recovery. When the Statute of Uses was introduced, the only estates in socage lands or tenements of the act of the party known to the Common Law were for years, for life, in tail, or in fee simple, and the rules that prohibited successive estates for life to unborn persons, and that required the remainder to take effect at the latest when the particular estate determined with the unfettering of estates tail superseded the necessity of any rule against perpetuities.

30. This is the law as propounded by Lord St. Leonards and Mr. Preston. The late Mr. Lewis has raised a grave doubt on the subject.¹

31. The Judges with great reason adhered to the rules of the Common Law where they could—and therefore as a fixed and immutable canon, it is the law that no assurance capable of operating through the medium of the Statute of Uses shall so take effect, when it can by the rules of Common Law. As a consequence, therefore, a limitation cannot operate as a conditional limitation if it can as a contingent remainder, and this formerly had a more important result than it has at present, because a contingent remainder was destructible by the acts of the persons having the prior, or existing legal ownership at law—whilst a conditional limitation could not be defeated by any such owner save where preceded by a limitation in tail, when the tenant in tail could bar the limitations over.

32. When however springing or future uses or con-

¹ Law of Perpetuities, 419.

ditional limitations were capable of conferring legal ownerships—such ownerships not being barrable by the act of the person entitled to the possession, or whose ownership was to be defeated or charged thereby except when subordinate to an estate tail,—then the necessity for a bridle against perpetuities became obvious, and the well-known rule was imposed.

CHAPTER VII.

USES AFTER THE STATUTE.

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| <ol style="list-style-type: none">1. <i>Every class of pre-existing use executed into estate according to the common law, if practicable. If not, then conformably to the ownership in the use.</i>2. <i>The various uses which existed at the time of the statute.</i>3. <i>As to present or immediate uses.</i>4. <i>Future or contingent uses.</i>5. <i>Essentials to the operation of the statute.</i>6. <i>As to seisin to the use, and herein of corporate bodies taking to or giving the use.</i>7. <i>Capacities of grantors and grantees to uses.</i> | <ol style="list-style-type: none">8. <i>As to the incapacity of or disclaimer by grantees to uses.</i>9. <i>Where grantee to uses deceased.</i>10. <i>Subject-matter for operation of uses.</i>11. <i>Of matters which in themselves lay in user.</i>12. <i>There must be a use in esse.</i>13. <i>As to future uses and liability to escheat of seisin to use.</i>14. <i>As to destruction of use by alteration of seisin, and herein of scintilla juris.</i>15. <i>As to its qualities.</i>16. <i>Its inconvenience and abolition.</i>17. <i>Privy of seisin to use.</i> |
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1. EVERY class of use that existed previously to the statute of 27 Henry VIII. became within its operation, giving ownerships, when extended into legal estates governed by the rules of the Common Law, whenever they were susceptible of being so governed, but when they might fail of operation according to such rules, *but not otherwise*, then taking effect for a new species of ownership not previously acknowledged by the Common Law. That effect, however, was always denied when the estates to be obtained under the statute, could operate by such Common Law rules. Hence the proposition, before adverted to, that no limitation shall operate by way of

conditional limitation, or as a future or springing use which can take effect by way of remainder.

2. The uses which subsisted at the time of the statute were *declared resulting, constructive, or implied uses*,—uses operating *in præsentî*, or *in futuro*, on fixed, but future events, or on contingencies—either declared in the instrument or arising from contract—or to arise thereafter at the volition of the author of the assurance, or of some person, then or thereafter to be designated by him, whether expressly, or by reference to any future character to be fulfilled. Those latter uses were termed *Powers*, which will be briefly noticed subsequently.

3. *Present Uses*, as on a feoffment or grant to A. and his heirs to the use of B. and his heirs, or a covenant to stand seised to the use of a wife or a son for life, or in fee, and not to take effect from an event or on a contingency or a bargain and sale to one for life or in fee. Upon all these uses existing at the passing of the statute a conveyance was virtually effected, and the seisin was transferred to the use so designated or implied, and the *cestui que* use, whether wife, son, bargainee, or otherwise, became legal owner according to the quality of the use thus declared.

4. But where the use was future or contingent, or depending on the nomination of the feoffor or grantor or of a third person named or referred to—or where the covenant was to stand seised, or the bargain and sale was, from a future period or event—then as the *cestui que* use was not to hold *until then*—it is evident that if the statute had never been passed, no conveyance would have been required, and therefore that the statute did not supply any seisin *until such time*. Consequently *ad interim*—then, as now—the *cestui que* use so already named would not, under the statute, have any legal ownership.

5. For the operation of the statute the essentials were : that there should be a person seised, and capable of being seised, to the use ; that there should be a subject matter, of which a use might be declared or arise ; that there should be a corporate body, or person capable of taking the use ; that there should be an instrument of sufficient validity to give the seisin to the use, or declare the use itself ; that there should be a use in esse, and that there should be, in particular instances, such privity as before adverted to, and hereafter particularly noticed.

6. With regard to there being a seisin to the use, the consideration of that point involves the question, whether a corporate body could take or give a use, and the capacity of a person to take to the use. The phraseology of the statute which speaks of *persons* being *seised* to the use of other persons, *or of bodies politic*, seemingly implied that a corporate body might be a *cestui que* use, although it could not STAND seised to a use. There was also the difficulty previously to that statute, of compelling the execution of the use—for which the writ of subpœna was the appropriate remedy. That could not be had against a corporation. It was therefore considered in practice, that a use could not arise on the SEISIN of a corporation, whether on an instrument taking effect by way of bargain and sale of their own seisin, or upon a conveyance to the *corporate* body to the prescribed uses. And, in theory, it was said that a corporation might *give* but could not *take* to a use,—that is, that on their bargain and sale for valuable consideration the use *arose* on their own seisin, while if a conveyance were made to a corporation to the use of another corporation or person, that the latter use would not be executed into legal estate by the statute. However, as previously observed, no reliance was had upon this distinction ; for if a corporation conveyed, the assur-

ance was taken by feoffment—or by lease and actual entry by the lessee, according to the Common Law—and a release thereon. Such lease and actual entry would have been unnecessary, if the corporation could *give* a use in its own seisin by means of the ordinary bargain and sale for a year.

7. All persons capable of becoming grantees were able to take to a use, whatever might be their respective disabilities as grantors. The king or queen, however, could not take to the use of another, but an alien, or a person attainted, might take to the use of a third person. Still, in the instance of the alien, and the attainted person, the legal estate acquired by such third person was liable to be defeated by the Crown, on office found. In ordinary cases *femes covert* or infants might, before the statute, be grantees, subject to the avoidance of the respective grants to them when their several disabilities should cease.

8. But it seems that, since the statute, whether a grantee to uses be of age or an infant, a married woman or otherwise, that no disability or disagreement could defeat or prevent the use, inasmuch as the instant the livery should be made or the deed delivered, &c., the statute transfers the seisin out of the feoffee or grantee, according to the prescribed uses.

9. At the same time, it must be borne in mind that if a *deceased person* should have been named as grantee to the use, inasmuch as no seisin could pass from the grantor, consequently no use could take effect on such attempted seisin. Unless, therefore, from the existence of an appropriate consideration, the assurance could be supported as a bargain and sale, or a covenant to stand seised—and if to have effect as a bargain and sale, the instrument were enrolled within six lunar months, the assurance would have failed.

10. The subjects whereon the statute operated consisted of lands, tenements, and real hereditaments holden of socage tenure, but the statute did not extend to copyhold.

11. But matters which in their own nature were in user could not be conveyed to a use, as a way or rent, created *de novo*. No one by conveyance to uses or by grant could give to A. and his heirs a way over the grantor's lands to the use of B. and his heirs, for, as was quaintly observed, one man cannot walk over lands to the use of another. So also should owner in fee simple have conveyed to A. and his heirs to the use, intent, and purpose, that B. and his heirs might *take* an annual rent out of the lands conveyed, and *hold* such rent to the use of C. and his heirs; the limitation thus intended of the rent in favour of the latter had not any *legal* operation, inasmuch as B. was the *cestui que use*, and C. would be only the *cestui que use* in the second degree: the statute gave a legal rent to B. in fee, who by the rules of equity became trustee thereof for C. This, in truth, would be a use upon a use, being a subject which is elsewhere observed on.

12. The next essential to the operation of the statute was that there should be a use *in esse*. Indeed it is obvious that until there was a *cestui que use* for some vested ownership, the statute could not have any operation. As a general principle, there ought to be some person seised to the use at the time when the use was to be executed; but practically this was not a universal proposition.

13. If lands were conveyed to A. and his heirs to the use of B. and his heirs from a future day, or if A. bargained and sold unto, or covenanted to stand seised, to the use of B. and his heirs from a future day, there seems good ground for considering if in either instance A. were interim

to die intestate, *without heirs*, that the lord by escheat, taking paramount, would not stand seised to the use—and consequently, as there was not any person seised to the use when it was to arise, it would not take effect.

14. But wherever a use was upon any assurance *operating by transmutation of possession*, limited *contingently*—and such use was preceded by a prior vested *use*, that was executed into estate by the statute, it was considered practically, that no alteration in the *seisin* could defeat the effect of the contingent use, should the event happen on which it was to arise. This involved the doctrine of *scintilla juris*.¹ After the Statute of Uses passed, this question arose—for instance, where A. seised in fee conveyed to B. and his heirs to the use of C., then a bachelor, for his life, with remainder to the use of C.'s first and other sons in tail, with remainder to the use of D. in fee—Was it or not necessary that there should be a seisin to supply the use for any son of C. when he was *born*, and if it were so necessary, then in whom should such seisin exist, and what was the quantity thereof? After several hypotheses, it seems to have been considered, that out of the seisin in fee simple of B., the life estate of C. as commensurate with the use to him was subtracted, and that subject thereto, and qualified by the possibility of the use arising to the first and other sons of C., the remainder of the seisin in fee in B. was withdrawn from him, and passed to D., the ultimate *cestui que* use in fee; so that as a seisin had been thus served to *all* the uses declared, except the possible use to the sons of C.—and every other portion of the seisin was withdrawn from B., except the possibility of the seisin to serve the possibility of the use—there was such possibility of the seisin, and which was termed *scintilla juris*.

15. Upon principle this was the right construction, but

¹ Now extinguished by s. 7 of the 23 & 24 Vict. c. 38.

practically it would have involved great inconveniences, for if this possibility of seisin remained in the feoffee or grantee to uses, what became of it, should B. die before the event for vesting the contingent use arose? Did it descend to his heir? Was it devisable, or could it escheat? If it escheated, then the contingent use was destroyed, and if the knowledge of these circumstances were a necessary preliminary to ascertaining whether or not the contingent use could vest; then in all the numerous cases where powers operating on the legal ownership by way of springing use, were to take effect, it became essential to investigate the title to this *scintilla*, and vendors would, for a mere theoretic point of law, have encountered harass, expense and inconvenience.

16. No stickler for *scintilla juris* was ever known to put his theory into practice, and the long usage of conveyancers in disregarding it in practice was virtually its explosion. That practice was repeatedly considered by the judges as settling the law on any particular point, although such usage were contrary to principle. *Ex. gr.*: the postponement of a dowress by the assignment of an attendant term to a purchaser with notice of her dower, a case of practical mischief, to one who is termed a favourite of the law. There could not be any reason why as regards *scintilla* the practice of conveyancers and the mischievous result of the doctrine should not overrule the theory.

17. The nature of the privity between the person having the seisin and the *cestui que* use which was requisite previously to the statutes 27th Henry VIII., have been already noticed. Since that statute, in consequence of the seisin being passed to, and no longer distinct from, the use—the law relative to such privity no longer applies generally to uses. Its principle is still, however applicable by analogy to trusts, see *Mansell v.*

Mansell.¹ In some instances, even at the present day, it has application to uses on assurances merely owing their operation to the statute, and not by transmutation of possession. As if A. seised in fee covenant, to stand seised to the use of a wife or relative from a future day (*not being merely the time of his own death or the failure of his issue*,—so as to raise an estate *by implication* in himself for *life* or in *tail*, and let in the future use as a remainder expectant thereon), it has been considered that any disturbance of the seisin of the covenantor before the use arises would be its destruction—but this question can be better considered hereafter in regard to the destructibility of uses.

¹ 2 P. W. 678. And see the opinions of Mr. Cheshyre and Mr. Peere Williams on the case, 1 Printed Ca. & Op. 121.

CHAPTER VIII.

ON THE SEVERAL KINDS OF USES.

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| 1. <i>Uses divisible into express, implied, resulting, or remaining uses, future, springing, or shifting uses.</i> | 6, 7. <i>And results.</i> |
| 2. <i>Express uses.</i> | 8. <i>For what ownerships resulting uses may be.</i> |
| 3. <i>Implied uses.</i> | 9. <i>Explanation thereof.</i> |
| 4. <i>Resulting uses only on assurances taking effect by transmutation of possession.</i> | 10. <i>Where uniting with estate executed to subsequent use.</i> |
| 5. <i>Instance thereof.</i> | 11. <i>Difference of uses by resultancy, and by implication.</i> |
| | 12. <i>Remaining uses.</i> |
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1. *USES* may be divided into *express* uses, *implied* uses, and *resulting* or *remaining* uses; and with regard to the time of their commencement, into *present* or *future* uses. Another division of them is frequently made into *springing*, or *shifting* uses.

2. *Express* uses require little comment. They might be contained in the instrument passing, or operating on, the seisin, or in some distinct instrument. It was not necessary that such distinct instrument should be simultaneous with the assurance transferring the seisin, for the use might be declared by an instrument executed previously, or subsequently thereto: the first, as applied to fines, being termed a deed to lead—the latter being denominated a deed to declare—the use.

3. *Implied* uses might arise, although there was not any previous instrument for passing the seisin, or although there was not any declaration of the use for

the period or estate as to which the implication would take place. As if one seised in fee simple, should have covenanted to stand seised after his death to the use of another, or should have bargained and sold to another, after the death or failure of issue of him, the covenantor or bargainor. In the first instance, an estate for life, and in the latter, an estate tail, was *implied* in the covenantor, or bargainor *for the interval previously to the express limitation* over—and legal ownerships by force of the statute, become thereby created, by way of particular estate and remainder; but in every other instance of a covenant to stand seised, or bargain and sale *from a future* day, no legal estate was, in the meanwhile, created by the statute; but the bargainor or covenantor continued seised in fee simple—and the bargainee or covenantee had not until the day, or event fixed for the use in his favour taking effect, any estate or interest, which he could transfer at law; but merely a future use transferable in equity, for a valuable consideration. Every attempt at alienation by the future *cestui que* use was ineffectual at law; and should the bargainor, or covenantor have died without heirs, so that the lord might take by escheat previously to the event fixed for the use arising, the same would be defeated.¹

4. *Resulting* uses could only arise on assurances taking effect by *transmutation of possession*—as where one seised in fee simple conveyed to another in fee, and there was not any consideration for the conveyance, or there was not any intent expressed that would require the legal ownership to remain with the grantee, and no use was declared in favour of the grantor.

5. If, therefore, A. conveyed by lease and release, feoff-

¹ The 4 & 5 Will. IV., c. 23, repealed by the Trustee Act, 1850, or the substitutionary provisions of the last mentioned statute do not seem to touch this question.

ment, grant, fine, or recovery to B. in fee, and B. did not pay consideration, or was not intended to be made tenant to the præcipe—which would require the fee to remain in him—and *no* use was declared in favour of the grantor, &c., or any other person; the *whole use* resulted in fee to the grantor, &c., and was executed into legal estate by force of the statute.

6. Except, therefore, for the collateral effect that it produced before the above covenant of revoking any prior will of A., the conveyance would have put him in his former situation, and the fee which he took by such resultancy was descendible in the like manner as previously to his conveyance. It having been considered that the use whilst in its fiduciary state was subject to the same descendible qualities, as the seisin of the *cestui que* use who created it.

7. As elsewhere remarked, it will be perceived that a conveyance and re-conveyance by force of the statute, which every resulting use in favour of a grantor is in fact, has a totally different operation to a conveyance and re-conveyance at the Common Law. For if A. *ex parte materná* were to enfeoff B. in fee, and B. accordingly made such a feoffment with the intent that B. should re-enfeoff him, or A. being a married woman and seised *ex parte materná* were conjointly with her husband to convey by fine *sur grant et render* to herself in fee. In each of these instances A. would acquire a new fee simple descendible to her heirs *ex parte paterná*.

8. A resulting use may be for any particular estate, where the use of only a portion of the fee is declared in favour of the grantee, &c., to uses, or any *other* person, for years, for life or in tail—or where the use is declared in favour of any grantee or third party from and *after the death or failure of issue* of the grantor.

9. In the first case, as the whole use would have resulted in *fee* to the grantor in case no portion thereof had been limited from him—so, as a legitimate consequence such portion thereof as was *not* limited *from* him, must *result*. Where on such conveyance of the seisin as before supposed, to B. and his heirs, if the use was limited to B. or any other person only for *years*, for life, or in tail, or was limited successively for fractional ownerships, not exhausting the fee, the use of the *fee expectant on such estate* for years, for life, or in tail, or on such successive fractional ownership resulted to A. in fee. The effect therefore of the conveyance was that the uses expressly declared for years for life, or in tail, were executed into corresponding legal estates, as also was the ulterior resulting use in favour of A. in fee simple. And the effect was the same as if the conveyance had gone on expressly to declare the ulterior use in his favor.

10. So, if the only use or uses declared on the conveyance to B. had been in favour of B. or any other person or persons—from and after the death or failure of issue of A.—an estate for *life*—or in *tail*—resulted to A. similar in operation to the like ownerships which would have been implied on any instrument not taking effect by transmutation of possession, as noticed in the last paragraph.

11. But such resulting uses must not be considered as precisely of the same nature as those noticed in that paragraph, for an estate tail by implication, and an estate tail by resultancy, arose in different ways. The estate by implication was the operation of the law changing a prior estate in fee simple into an estate in tail, although there had not been any attempt at alienation by the prior owner in fee simple, who so became tenant in tail—while in the other case, the estate tail by resultancy arose on the

seisin of a *third* person to whom the person thus becoming tenant in tail had made a conveyance in fee simple.

12. *Remaining* uses were—where on a covenant to stand seised or bargain and sale, a use was limited to arise from a future period—*not being the death or failure of issue of the covenantor or bargainor*—and consequently in the meantime, the whole seisin of the covenantor or bargainor remained *undisturbed*, but the use qualified the same into a fee determinable, when the event for the future use should occur. The distinction between a remaining use and a resulting use was important—for a resulting use might be varied by parol, whilst a remaining use did not admit thereof.

NOTE.

IN the Appendix to Mr. Browell's valuable notes on the Real Property Statutes, there is a letter from Mr. Bellenden Ker, connected with this subject. It has considerable felicity of diction, and evinces great powers of analysis and combination.

The distinctions there presented arise on a very subtle and elusory matter, and are worthy of Fearne, whose powerful reasoning in the 165th and following pages of his *Contingent Remainders* (by Butler), must ever command admiration.

Lawyers are not always mere lawyers. In the writer's time, there have been many of elegant minds, and elegant pursuits: Butler, Merivale, Swanston, Henry Maddock, the kind and gentle John Hodgson, Q.C., *the more you knew him, the more you loved him*; John James Park, Professor of Law at King's College, author of the *Treatise on Dower*, and the *History of Hampstead*; Isaac Preston Cory, Fellow of Caius College, Cambridge, who published the *Greek Fragments*, the author's most honoured friend and pupil. All these are gone, save one, and may his life be spared to his friends as long as it is valuable to himself.

The law belongs to the educated gentleman—there needs consequently no apology for apprising the student that even in the Reports there are literary gems. The judgment of Chief Justice Crewe, upon the contest for the Earldom of Oxford, in the Reports of Sir William Jones, page 96, is of great eloquence and beauty; and Lord Mansfield, in his speech, *Rea v. Wilkes*, 4 Burr. pages 2561 to 2563, shows that “silver-tongued Murray” could

clothe in choice and elegant English, thoughts and feelings worthy of the favourite of Pope, by him apostrophised :—

“Graced as thou art with all the power of words.”¹

* * * *

“From morn till night, at senate, rolls, or hall;
Plead much, read more, dine late, or not at all.”

If acute and close reasoning can please, the argument of Lord Eldon, when Mr. Scott, in *Ackroyd v. Smithson*, 1 Brown’s Chancery Cases, and by which he changed Lord Thurlow’s opinion; and the discussions and judgments in *Haycraft v. Cresey*, will afford a mental treat.

The difference of opinion in the last-mentioned case by the other three judges from Lord Kenyon, is traditionally stated to have killed him. He is reported to have uttered the plaintive ejaculation, “God help me! I have been wrong all my life.”

It certainly appears from “East” that he sat only the remaining four days in Michaelmas Term, that he appeared but once in the ensuing Hilary Term, and died at Bath in the following vacation. The case was, that Miss Robertson, an accomplished swindler at Blackheath, had defrauded the plaintiff, who credited her upon the defendant’s recommendation that she might be trusted, and that the defendant spoke from his own knowledge. Persons not being lawyers would at the first blush, imagine that the defendant ought to have answered for his rashness of assertion,

¹ It is as well to forbear the bathos of the next line—

“So loved, so honoured, at the House of Lords”

which caused the felicitous burlesque by Cibber—

“Persuasion tips his tongue whene’er he talks,
And he has chambers in the King’s² Bench Walks.”

² “To number ‘five’ direct your Doves.”—POPE.

No. 5 still remains—but alas! where are the Doves?

and would agree with Lord Kenyon ; but lawyers who recalled the wise provisions of the Statute of Frauds, and know that the gist of the action is the scienter, would concur with the three judges, that unless he knew that he was uttering a falsehood, the action would not lie. Gibbs, afterwards Chief Justice, and who argued the case in support of Lord Kenyon's opinion, stated, in Holt's Reports, 388, that he considered the judgment of the three judges correct, and such is now the law.

CHAPTER IX.

DISTINCTION BETWEEN CONTINGENT REMAINDERS AND CONDITIONAL LIMITATIONS.

1. *Distinction between contingent remainder and conditional limitation, less material since 8 & 9 Vict. c. 106, s. 8.*
2. *Remainder created by same deed or compound assurance as particular estate.*
3. *Estate by one deed and another subsequently by distinct assurance, not particular estate and remainder.*
4. *Essentials to validity of remainder to take effect eo instante, the particular estate determined, and not to defeat the estate.*
5. *Example of an attempted remainder after an interval subsequently to the determination of the particular estate.*
6. *The effect of such an attempt.*
7. *Effect at common law of the remainder being intended to determine the particular estate.*
8. *Previously to the statute such an interval might have existed on limitations of uses.*
9. *So a use limited quasi in remainder might have defeated the use previously limited.*
10. *No rule of tenure infringed by such a construction of uses.*
11. *Exposition of this first distinction on the law of uses.*
12. *And on the second.*
13. *Construction after the statute that all assurances should, if possible, take effect by the common law; but where not, then the ownership under the law of uses allowed.*
- 14, 15. *Example and effect on the interval between the first and next succeeding limitation of the use.*
16. *Resulting uses.*
17. *Effect thereof.*
18. *Further explanation.*
19. *Destructibility of contingent remainders.*
20. *Effect of the 8th section of the 8 & 9 Vict. c. 106.*
21. *State of the law previously thereto.*
22. *As to assignments previously for valuable consideration of such rights.*
23. *Instances where a Court of Equity interfered or declined on attempted assignment of such rights.*
24. *Effect of the enactment 8 & 9 Vict. c. 106, s. 6.*

1. SOME attempt may now be made to explain the distinction between a contingent remainder and a con-

ditional limitation ; although, since the enactment, 8 & 9 Vict. c. 106, s. 8, one material consequence—of the contingent remainder being destructible, while the conditional limitation was not so, before the happening of the contingency—no longer exists.

2. A remainder of the legal ownership must be created by the same deed or instrument as the prior particular estate, or by means of the same compound assurance, (although in several instruments,) as under a deed creating a power, and a subsequent appointment by virtue thereof or by will and codicil.

3. But otherwise, an estate for life or in tail created by one deed, and a subsequent limitation in tail or in fee by *another* deed, were not in the nature of particular estate and remainder, they were not parts of the same estate, through owing their existence to several liversies or distinct grants.¹

4. It was essential to the validity of a remainder, that it should take effect at the latest *eo instante* that the particular estate determined, and that there should not be any interval between the particular estate and the remainder. As also that the intended limitation by way of remainder, should not defeat the particular estate previously to the period for its natural determination.

5. There could not be an interval of time between the determination of the particular estate, and the day or event when the remainder was to take effect in possession. For instance, a feoffment or grant at the common law to A. for his life, and one year after his death to B. for life in tail or in fee simple, would, as before noticed, have

¹ And see the analogy as to copyholds, where, by the custom, the admittance of the tenant for life is that of the remainderman ; but if a life estate be first created,

and the fee subject thereto descend or be devised, the admittance of the tenant for life is not the admittance of the reversioner.—Fearn's Posthuma, 105.

been invalid, as to the attempted remainder to B., for when the livery or grant was made to A. for his life, it determined, and could not operate further. There was not then *by such assurance* any ulterior feoffee or grantee.

6. The land came back to the feoffor, or his heir, and so of a grant under similar circumstances, the freehold could not be in abeyance ; there would not be any person, during the suspense of the ownership, to answer to the precipe of strangers. To entitle B. to the fee simple after the interval, a new livery or a fresh grant, if a grant were feasible, must have been made.

7. It was also an essential, that the particular estate should not be determined in favour of the remainderman, before the natural determination of such particular estate. If the particular estate was to determine, that could only be by way of condition in defeasance of the livery or grant bringing back the land to the *feoffor or grantor*. If, therefore, land had been limited to A. for life, any attempt to pass the ulterior fee or any portion thereof, during A.'s life to B. in possession, would virtually be to limit the benefit of a condition to a stranger ; and see the commentary of Fearne on Bacon's Abridgement, Cont. Rem. 264.

8. But previously to the Statute of Uses, a feoffment or grant might have been made to H., giving him the common law seisin in fee, to the use of or in trust for A. for his life, and one year after A.'s death, to the use of or in trust for B. in fee.

9. So, a feoffment or grant might have been made to H. in fee, to the use of A. for his life, and if B. should return from Rome in A.'s lifetime, then immediately after that return to the use of B. in fee.

10. In each of these two last propositions, no rule of tenure or common law principle was infringed. H. as

before observed, had the common law seisin in fee simple, and the laws of Tenures had not any application to the *personal* trust or confidence reposed in him.

11. In the first of these propositions, H. or his heirs would hold to the use of or in trust for A. during his life, and after his death, and until the expiration of the year, would hold to the use of or in trust for the feoffor or grantor *or his heirs*, and, after the expiration of that interval, then to the use of or in trust for B. in fee.

12. And in the second of such propositions no Rule of Tenure would be infringed by holding that the trust or confidence for A. during his life might be determined by B. coming from Rome previously to A.'s death, and that instantly, on such return by B. becoming entitled to the use in fee.

13. The Judges, as before noticed, after the Statute of Uses came into operation, determined that all assurances that were capable of operation for ownerships consonant to the Common Law, should be governed by its rules ; but where an instrument owed its effect wholly or partially to the Statute of Uses, and could not operate according to the strictness of the Common Law, then it might receive a construction conformable to the principles of uses, which existed before the statute.

14. And therefore, that although a feoffment or grant operating *at the Common Law* (and *not* by way of declaration of use), as to A. for life, and one year from his death to B. in fee, would be void as regarded B., as well subsequently to as before the Statute of Uses ; yet an assurance to H. in fee simple, to the use of A. for his life, and at the interval of one year from his death to the use of B. in fee, would be valid, although conferring through the medium of the statute an ownership unknown to the common law.

15. There would in this latter instance pass by the statute *instantly* to A. an estate for his life, in like manner as if previously to the enactment thereof H. had made such a conveyance to A. for his life. But, as with the exception of such life estate, no present and immediate ownership was to be taken under the use, for that was not to commence until the lapse of a year from the death of A.; the use or trust was not disposed of *during that period*, and the feoffor or grantor retained the same, as *part of his former ownership or dominion*, and he or his heirs would be entitled to the use during such period. In other words, there would have been a *resulting* use to such feoffor or grantor in fee simple, determinable at the end of the interval in favour of B. in fee.¹

16. The statute as premised executes into legal estate every use, whether *present, future, express, implied, or resulting*, according to their respective plight, nature, or quality. Its operation therefore would be at law to *give* an estate to A. for his life, and after his decease, then the inheritance at law would *remain* with the feoffor or grantor. But then the question arose, what was its effect as regards the future use to B., in fee simple, to arise after the lapse of the year from the death of A.? In the interval of that year the statute could not give the legal ownership to B., for he was not to have the same until the time was expired; and as in the meanwhile the legal fee simple would be in the feoffor or grantor in respect of the use thereof, which he had not intermediately disposed of, and as there could not be a fee simple after a fee simple, *or two fees simple of the rightful ownership at the same time*, consequently the use to B. remained unexecuted into estate by the statute. That use was executory; it was a fixed right to have the fee at a

¹ See note, post, p. 62.

future period, but there was not any intermediate seisin in B.

17. But when the year after A.'s death had elapsed, then the statute determined the fee which, *subject to the estate for the life of A.*, had been with the feoffor or grantor or his heir. Such fee, so determinable at the end of that period, ceased by force of the statute, without entry or claim on the part of B. or his heir.

18. It is true that if, when the *statute first came into operation*, a person who stood seised to the use was disseised, he must have entered and regained the seisin, in order to hold to the use, for until *then* the statute could not pass the seisin *from him*; but *since the statute*, although the benefit of a future or contingent use may be released by the person *entitled* thereto—yet it is indestructible except when and whilst subordinate to an estate tail.¹ In the latter instance it may be destroyed by such an act of the tenant in tail as would bar his own estate tail and limitations over; for if he could bar a vested fee simple expectant on his estate tail, *à fortiori* he may bar *the right* to such a fee, whether to arise by future use or otherwise. Indeed, should there be a future use to determine *his own* estate tail, he may, before the time or event at which such uses have effect, bar the same.

19. But, by reason that until a contingent remainder could vest a particular estate or at least a right of entry in respect thereof should continue, every determination of such particular estate before the contingency happened, as did not leave a right of entry, whether such determination resulted from the feoffment, forfeiture, surrender, or other

¹ It is not however clear that the future use may not be destroyed where limited under a bargain and sale or

covenant to stand seised. See 1 Sand. Uses, 151, 5th ed.; 1 Sugd. Pow., p. 44, 8th ed.

act of the particular tenant, prevented the contingency arising. This axiom is exemplified in the 5th chapter of Fearne's Contingent Remainders.

20. Now, however—by force of the enactment of the 8th sec. of the 8 & 9 Vict. c. 106, such destruction of a contingent remainder cannot take place, but still the same will determine if the contingency do not happen.

21. Neither the right to a future use nor this right under a contingent remainder was assignable *at law*,¹ but if the same was in respect of a fee simple ownership, it was descendible,² and devisable.³ So that if a person entitled under a contingent remainder should, before that remainder had vested, or a person entitled under a future use should, before such use was executed into estate, have assumed to convey the land subject to such contingency, or to such future use, nothing would have passed at law by this extended conveyance.

22. When the contingency happened, or the period came, which was to execute the future use into estate, then a *new conveyance* must have been obtained from the intending alienor, his heir or devisee. And if the heir or devisee, who had thus obtained the legal ownership, declined to convey the same, then a Court of Equity would have compelled him to make such conveyance, if the proposed alienee was a purchaser for valuable consideration, *but not otherwise*; and hence the rule formerly laid down, that a contingent remainder, or future use, was not assignable at law, although it was in equity for a valuable consideration.⁴

23. But this further consequence ensued—that as a Court of Equity *never* interfered against a purchaser for

¹ *Weale v. Lomer*, Pollexfen, 54.

³ *Selwyn v. Selwyn*, 2 Burr. 1131.

² *Wood's case*, 2 Roll. Rep. 15; *Chadleggh's case*, 1 Co. 99 a.

⁴ *Wright v. Wright*, 1 Ves. sen. 409.

valuable consideration *without notice*—should the person who had acquired the legal seisin, by means of the contingent remainder having vested, or in right of the future use being executed into estate—have conveyed for valuable consideration, without notice of the *first* assignment—the estate would pass at law to the *second* alienee, and he would have equal equity with the first alienee, and a court would not interfere against him.

24. At the present day, by the 6th section of the above mentioned statute 8 & 9 Vict., a contingent or executory interest is made assignable by deed, that is, the assignee is put in the place of the assignor, yet no legal *estate* passes *until the contingency happen, or the period for executing the use arrives*; but upon such contingency happening, or period arriving, instead of another conveyance being requisite from the alienor, his heir or devisee, the seisin will be in the alienee, his heir, devisee, or assignee, by deed.

NOTE.

IN a standard work of acknowledged merit, 1 Sand. Uses, 142, 5th ed., this passage will be found :—"Thus if a man covenant to stand seised to the use of the heirs of his own body, or to the use of another after his own death, or if he bargain and sell his lands after seven years ; in each of these cases the grant is good, and until the event takes place the use results. But in conveyances, operating by way of transmutation of possession, it is necessary that a present seisin should be transferred in order to serve the resulting use. Thus, if a feoffment or case and release be made to J. S. and his heirs, to the use of J. S. and his heirs, to commence four years from thence or after the death of the grantor, the limitation of the use to J. S. is good, for *during the four years, or the life of the grantor, it will result and be executed.*"

With every respect, and no one had more, personally or professionally, than the writer for Mr. Sanders, there is an inaccuracy in the proposition "if there be a bargain and sale of lands after seven years the use results." It is submitted that there could not be any resulting use in that instance ; the bargainor would not part with the seisin. There is a *remaining use* ; nor is this a mere verbal distinction, for independently of this incorrectness of definition, important consequences might arise on the difference between a *remaining* and a *resulting use*, as Mr. Sanders himself points out, p. 151, *ib.*, and see Sugd. Pow. p. 445, 8th ed. *If the bargainor or covenantor did not provide that the use shall arise until a future day, he must necessarily retain the seisin, and the use thereof in fee, also until that day.*

And again, in p. 144, Mr. Sanders observes :—"In

Davies v. Speed, 2 Salk. 675, the Chief Justice held ‘that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the whole estate remained to the feoffor in the meantime ; so it is, if it were to commence after the death of A. without issue, if he died without issue in twenty years.’ This doctrine is assumed by others ; but it does not appear to have been considered with any degree of attention. Bacon (63) expressly says, ‘If I bargain and sell my land after seven years, the inheritance of the use only passeth ; and there remains an estate for years by a kind of subtraction of the inheritance ;’ and this seems to be the proper construction of the statute.”

The inference from this would be, that Mr. Sanders considered there was a remaining use, and a consequent term of seven years on the bargainor. It is however submitted that whether the future use be limited by a bargain and sale, or covenant to stand seised, leaving the seisin in fee, *ad interim*, with the bargainor or covenantor—or, on a conveyance, operating by transmutation of possession—as on a feoffment, &c., to A. and his heirs, to the use of B. and his heirs after the end of seven years—in the first instance, the undisturbed seisin and the use thereof, in fee simple remains with the bargainor or covenantor, and in the latter instance, the resulting use is *in fee defeasible at the end of the seven years, by a springing or future use in favour of B. in fee simple*.

The intention was not to part with the use of the fee until the seven years were passed. When the feoffor, &c., conveyed the seisin to A. and his heirs, we have a right to assume that he, the feoffor or grantor, had *the seisin*, and *no other person had the use* thereof in fee ; he parted with the whole common seisin in fee to A., but the use of the fee was not to pass to B. until seven years had expired. It would be a legitimate consequence that *ad interim the use*

of the fee not being limited away remained with or resulted to the feoffor, &c. ; Mr. Preston evidently so considers in 1 Absts., 105. And the doctrine in equity, that the trusts of an attendant term for say five hundred or one thousand years, shall be for the real and not the personal representative, must apply to the benefit of the use for the interval of the seven years.

The duration of the term, whether for seven, twenty-one, or five hundred years, cannot alter the principle. The intention was only to give the use of the fee to B. from a future day, and there was not any superadded intention *ad interim* to convert the ownership of the feoffor into a *chattel interest*, and to disinherit the *heir* in favour of the *personal* representative.

The rule appears to be this. Whenever a use is undisposed of *in presenti*, it remains or results in fee simple, with two exceptions. First, where the use is to arise on the death of the bargainor, covenantor, or feoffor, &c. There, from necessity, there cannot be any resulting use of the fee simple, for as the future use is to arise on the death of the covenantor, &c., no fee could result or remain, for the heir or devisee could not take. The second exception is where the covenant, bargain, and sale, or feoffment, &c., is to the use of heirs special of the covenantor, &c. There a *general* fee could not result defeasible on death by a special heir, for no general fee simple could descend, and consequently there is an implied or resulting estate tail.

But now that under the 2nd sec. of the 8 & 9 Vict. c. 106—the immediate freehold lies in grant, as well as in livery—the assurance, by bargain and sale or by covenant to stand seised, has become obsolete—and, the distinction is no longer of practical importance—but should be noticed on an attempt to treat the subject scientifically.

CHAPTER X.

ON A DEVISE TO USES.

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| 1. <i>Authorities that there may be such devise.</i> | | <i>time. Suggestion of Lord St. Leonards for avoiding that difficulty.</i> |
| 2. <i>On death of devisee in testator's life-</i> | | 3, 4, 5. <i>Comments thereon.</i> |
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1. It seems admitted by the concurrence of text-writers of the greatest eminence (see Sugd. Gilb. 356, note ; Butl. Co. Litt. 271 (*b*) note ; 1 Sand. Uses, 5th ed. 250, note ; 1 Jarman, 209) that, although the Statute of Wills was subsequent to the Statute of Uses, yet there may be a devise to uses which would be executed by the last mentioned statute.

2. As Lord St. Leonards remarks (1 Pow. 171, 7th ed. ; p. 148, 8th ed.), it has been observed that the question, except in a few instances, is of very little moment. It may arise on a devise to A. and his heirs to uses, if A. should pre-decease the testator, as it might be urged that there is a lapse of the seisin to supply the uses, and they would not arise ; and therefore it is recommended ("Treatise on Powers," *ut supra*) that the devise should be at once to the uses intended.

3. But, in substance, this would seem a testamentary *direction*, that the testator's *heir* shall stand seised to the uses. It is admitted that, if in consequence of the death in the testator's life of the entailed devisee to the uses, the

testator's heir took the seisin *at law* freed from the uses, yet he would by the Court of Chancery, be directed to convey to such uses.

4. There would not be any very great breach of principle for a Court of Law to decide that a devise to A. and his heirs, to uses, where if A. survived, the seisin would be instantly transferred from him, should in the event of his death in the testator's lifetime, be deemed equivalent to a direction that the *heir* thus, by lapse, taking the instantaneous seisin of the devisee, should be bound in like manner, to stand seised to the uses.

5. This construction would it seems remove the difficulty, 1 Sugd. Pow. 7th ed. 174, whether a power was to operate at Common Law, or through the Statute.

CHAPTER XI.

ON RESULTING USES, WITH REFERENCE TO DISPUTED QUESTIONS THEREON.

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| <ol style="list-style-type: none"> 1. <i>Fixed future use. Cestui que use has no estate or seisin until the use takes effect.</i> 2. <i>But the benefit thereof devisable or descendible, and now alienable by 8 & 9 Vict. c. 106.</i> 3. <i>State of law previously to that enactment.</i> 4. <i>Effect of such enactment.</i> 5. <i>Indestructibility of fixed or future springing or contingent use.</i> 6. <i>No resulting use to grantor where</i> | <ol style="list-style-type: none"> <i>express limitation of the use for the whole period of his life.</i> 7. <i>Difference of opinion where limitation of the use to grantor for years.</i> 8. <i>Cases of Adams v. Savage, and Rawley v. Holland.</i> 9. <i>Opinions thereon of Butler, Sugden, Serjeant Hill, and Mr. Preston.</i> 10. <i>Cogency of remarks of Mr. Sanders.</i> 11. <i>Observations therein.</i> 12. <i>Opinion of Mr. Butler seemingly preferable to that of Lord St. Leonards.</i> |
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1. As before remarked, a *future*, a *shifting* or a *springing* use gave no *estate* or *seisin* until the day or event fixed for it to take effect. On a conveyance to A. and his heirs to the use of B. and his heirs five years hence, B. in the interval has a fixed and certain ownership, but until that time be expired, he has neither estate nor seisin.

2. If he die previously, the ownership may pass by his will, for it was devisable, and if he die intestate, it would devolve on his heir. But, previously to the 8 & 9 Vict. c. 106, sec. 6, taking effect, this future use could not be aliened, so as to give the alienee the legal fee when the day arrived.

3. Had there been an attempted conveyance, the same might have been supported in equity, by force of the contract, if for valuable consideration—and when the five years should have expired, then the alienee for value must have required an actual conveyance of the fee from A., or his heir—for without such conveyance, the fee would have remained with A. or his heirs, and B. would not have had any legal ownership.

4. But the 6th section of this last mentioned act having rendered a contingent, executory or a future interest assignable by deed, the result is that the alienee of the same, *when the day or event shall have arrived*, that was to give efficacy thereto, will have the legal ownership, according to the intent of the assurance, without any further assurance from the alienor or his heir—but *until that day or event he would not have the legal ownership any more than would his assignor*.

5. Every *future springing or contingent use*, except probably in some instances, where limited by bargain and sale or covenant to stand seised—or, where to uses—when expectant on, or posterior to an estate tail, seems indestructible. For this reason, it must be seen, *when such a use is limited*, that it will take effect if at all, within the limit against perpetuities. Should it not, the use would be void—except when in the power of a tenant in tail—nor will the event save it.

6. But the use would not result to the grantor or feoffor for life, if there was an express limitation of the use which must embrace the whole period of his life.

7. A difference of opinion has been expressed, where there was a limitation of the use to the grantor or feoffor for years, whether there could be a resulting use to him for life, that would support a limitation to the use of the *heirs of his body*, that otherwise would be void as a con-

tingent remainder for want of a prior estate of freehold to support it.

8. The cases of *Adams v. Savage*,¹ and *Rawley v. Holland*² certainly decided that there could not be such resulting use, and consequently that the limitations failed.

9. These cases are cited and commented on, in Butler's *Fearne*,³ and Gilbert on Uses, by Sugden, and the notes pages 119, 164, and in 1st Sander's Uses, 5th ed., p. 148, and note. Lord St. Leonards there, and in the 2nd section of the 1st chapter of the 8th Edition of Powers, (where he has recast these notes,) considers that the limitations being intended as remainders must fail, and that they could not operate by way of future use. Mr. Sanders, Serjeant Hill, and Mr. Preston were of opinion that the limitation to the heirs of the body was capable of taking effect by way of future use, and Mr. Butler—note, p. 42, *Fearne*—also thought that the use might result to the grantor *for his life*, notwithstanding that the term of years limited to him would be thereby merged.

10. The observations by Mr. Sanders, that *Adams v. Savage* and *Rawley v. Holland*, were decided previously to *Gore v. Gore*, 2 P. W. 28, have great force.

11. It may be fully admitted, that where a limitation can take effect by way of remainder, it shall not operate as a springing use; but where, *ab initio*, it never could operate by way of remainder, it appears an arbitrary construction, that there shall be a resultancy of the use of the whole fee to the grantor, and thus entirely defeat the deed, rather than a resultancy of a life estate to him, merging the term of years in himself.

12. It is submitted, with the highest deference to Lord St. Leonards, that in consonance with the opinion of Mr. Butler, a use conferring an estate for the life of the

¹ 2 Salk. 679.

² 2 Eq. Abr. 753.

³ Page 42.

grantor might result to him so as to create an estate tail in him by the rule in *Shelley's Case*,—or that if there could not be such resultancy by implication, as being contrary to the express estate for years—still the use to the heirs of the body could have arisen as a *springing* or *future* use.

CHAPTER XII.

SPRINGING, SHIFTING, OR SECONDARY USES.

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| <ol style="list-style-type: none">1. <i>These denominations indiscriminately applied, but seemingly impossible to be accurately distinguished.</i>2. <i>A shifting use in common parlance.</i>3. <i>Incorrectness of distinction. Practically a real shifting use seems illegal.</i> | <ol style="list-style-type: none">4. <i>Shifting use must operate within the limit against perpetuities.</i>5. <i>Discussion of the complicated questions thereon foreign to the present work.</i> |
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1. THESE denominations are often indiscriminately applied. It is impossible to distinguish accurately one class from the others, nor, as elsewhere observed, is the nomenclature of consequence.

2. What is termed a *shifting* use is in common parlance applied to a use that determines a limitation, or a series of limitations, and accelerates or substitutes some other. As, upon the omission to assume a name or arms, or on the succession to a particular estate, or on the refusal to settle a specified property.

3. But there the words "*shifting use*" only denote one *result*, viz., the passing of the property in another channel, as in truth is the effect of every future use, that arises under the exercise of a power or otherwise, in defeating or postponing a subsisting ownership. But a shifting use essentially would be such a use as Judge Walmesley is reported in *Corbet's Case*, 1 Co. 87, to have said is void, for the law did not allow such fractions of estate—*exempli*

gratid—a feoffment in fee to the use of A. and his heirs every Monday, to the use of B. and his heirs every Tuesday, and to the use of C. and his heirs every Wednesday, or it would be a use analogous to the trust that in *Duffield v. Elwes*, 2 Sim. & Sta. 544,¹ Vice-Chancellor Leach was inclined to raise by construction. First, vesting the land in an eldest son, then divesting the same on the birth of a second son, and afterwards on the death of such second son revesting the land in the eldest son—being in effect rather a *dancing* use than a *shifting* use.

4. The effect of a shifting use being to divest the pre-existing ownership, and the same not being defeasible except where subject to an estate tail, it is essential to its validity that it should take effect within the rule against perpetuities.

5. To enter into any discussion on the various and complicated questions which arise on these uses or on similar limitation by way of executory devise would be foreign to the purpose of this work.

¹ And see Sugd. House of Lords, 300.

CHAPTER XIII.

ON THE LAW OF ESCHEAT, AS REGARDS RESULTING USES.

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| <ol style="list-style-type: none">1. <i>Resulting use, consequence of limitation of a future use, but intermediate use declared.</i>2. <i>Part of the original dominion of the grantor vested, liable to be divested. If future use on contingency that does not happen, the estate by the resulting use becomes indefeasible.</i>3. <i>Is alienable, devisable and descendible.</i>4. <i>Future use may be executory.</i>5, 6. <i>Material to consider whether there</i> | <ol style="list-style-type: none"><i>can be any escheat of a fee acquired by resulting use and inquiry thereon.</i>7. <i>Seemle that proposition that escheat cannot be of determinable fee does not decide the point.</i>8. <i>Question then whether the lord by escheat will be bound by the use.</i>9. <i>He would not before the Statute of Uses, and it seems would not since.</i> |
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1. A RESULTING use, as before observed, is the consequence of such a future use being limited, as would be repugnant to the rules of Common Law. As, an estate of freehold to commence *in futuro*, either in the inception of the limitation of the *legal* ownerships—or leaving a *hiatus* between present ownerships, which may be executed into estate consonant to the rules of the Common Law, and any time or event, when the future use is to take effect,—or defeating a prior particular estate before its natural determination,—and on such premature defeasance limiting a use to a stranger.

2. The resulting use is part of the original dominion of the grantor. It is vested, though liable to be divested. If the future use be limited on a contingency, that does

not happen, then the estate arising under the resulting use becomes indefeasible.

3. The resulting use was an estate *alienable, devisable* and *descendible* at law.

4. But the future use is no *estate*, it is merely executory, and a *right* to have the land when the time or event arrives.

5. It may be very material to consider whether there is any escheat of a fee acquired by a resulting use that has been executed into estate on a conveyance *operating by transmutation of possession*, but is subject to be defeated by a future use : as, for instance, if there be a conveyance by A., seised in fee simple, to B. and his heirs, to the use of C. and his heirs at the end of five years, in such case, as has previously been submitted, there is not a resulting use merely *for five years* to A., creating a chattel interest in him, and which, whether the lands limited should yield a rental of £5 or £5000 yearly on the death of A., within the term, would give the lands to his personal, and not to his real representatives for the residue of the term ;—but there is, in truth, a resulting use *in fee* to A. determinable at the end of five years, and which on his death within that term would devolve to his heir or devisee, but might determine when the five years had expired in favour of C. or his real representative.

6. But suppose A., in such case to have died before the expiration of five years intestate and without heirs, the inquiry then would be, whether there is an escheat to the lord of the fee, and whether the fee thus acquired by the lord would determine, at the end of the five years, in favour of C.

7. It is submitted, that the proposition that an escheat to the lord cannot be of a determinable fee simple will not decide the point, unless it can be predicated that

where tenant in tail gives a base fee to one and his heirs so long as there are heirs inheritable to the intail, and the alienee dies intestate and without heirs,—then the lord should not by escheat take this base fee, or taking it should hold subject to its determination in failure of the issue inheritable to the intail. It is apprehended that the lord would take by escheat, but could not hold as against the person who would be entitled on the failure of the issue so inheritable.

8. The question must then be determined under another aspect, as whether the lord taking the seisin by force of the resulting use in consequence of the death intestate and without issue of A., would be bound *as A.* was by the use limited after five years to C.

9. Before the statute of 27 Henry VIII. it is well known that the lord having by escheat a seisin in fee limited to supply a use, would not be bound by the use. Is he now so bound, when he takes the seisin executed to a use that was determinable by a future use? It is considered on the principle of *Burgess v. Wheat*, if C. the owner of the future use should have died intestate, and without heirs, within the five years, there would not have been any escheat of the use; but in such case A. having taken the fee by resulting use determinable at the end of five years, would, in consequence of there not being any person to take through, or in right of C., thenceforth hold in fee simple, freed from its prior determinable quality. Shall not the lord taking by escheat the fee of A., so hold? Upon principle it would seem to be so, but there does not appear any decision on the point; yet the author apprehends that the future use would take effect where limited on an assurance operating by transmutation of possession.

CHAPTER XIV.

OF RENTS CREATED THROUGH THE MEDIUM OF THE STATUTE OF USES.

1. *As to rents de novo expressly authorised by statute.*
2. *Rents de novo may be limited in futuro, if not infringing the rule against perpetuities.*
3. *Rent in esse not grantable in futuro ; but use may be declared thereof in futuro.*
4. *Effect of disentailing rent granted in tail, without limitation over.*
5. *Effect of grant of rent for greater ownership than the grantor has in the land.*
6. *Where estate in land enlarged. Rent enlarged.*
7. *No escheat of a rent.*
8. *Rent in fee out of socage and gavel-kind, lands descendible according to common law.*
9. *Where intention to limit rent to several successively in tail, there should not be several successive grants thereof.*
10. *But a grant thereof in fee, and then an intail thereof created.*
11. *Powers of distress and entry for recovery of rent.*
12. *Grant thereof generally not necessary since G. 2.*
13. *But statutory powers not equivalent to conventional.*
14. *How these powers are limited in application thereof.*
15. *And hence expediency of a term of years by way of additional security.*
16. *Ejectment may be maintained by means of power of entry.*
17. *These powers pass at law with the rent.*

1. RENTS *de novo* may be created, as may rents *in esse* be limited, through the medium of the Statute of Uses. In fact that statute expressly provides for rents being conveyed to uses.

2. A rent *de novo* may be limited *in futuro* without any preceding estate of freehold, so as the event or period on which the rent is to arise, would not violate the rule against perpetuities.

3. But a rent *in esse* cannot be granted *in futuro*, for there would not be any immediate grantee, but such a rent, if holden in fee, may be granted to A. and his heirs, to the use of B. from a future day, for there would be an *immediate* grant of the seisin of the rent; it is the use thereof only that is *in futuro*, and in the meantime, the rent would result to the grantor in fee.

4. If a rent be granted to one in tail without remainder over, any disentailing assurance, purporting to be in fee, will in truth only pass to the alienee a base fee, that is a fee determinable on failure of the issue inheritable to the intail, and which fee, of course, will determine on default of such heirs.

5. If one seised of land for life, or for a determinable or defeasible fee, grant to another a rent for life or in tail or in fee, this rent would determine with the estate of the grantor. See 1 Prest. Estate, 17. And, so if tenant for life of land, assume to grant a rent in tail, these would give only a *quasi intail* thereon.

6. So if tenant in tail of land should grant a rent in tail, or in fee, to be issuing thereout, although such grant would have determined with the estate tail in the land, yet if the tenant in tail should enlarge his estate into a fee simple in the land, that would support and give validity to the prior grant of the rent.

7. If a rent should be granted in fee and through the bastardy of the grantee or alienee in fee thereof, or from any other cause there should be a failure of heirs to take the rent, that would not cause any escheat of the rent, since a rent although a tenement does not properly lie in tenure.

8. If a rent be granted to one and his heirs out of socage and also gavelkind land, the descent thereof will be to the common law heir, in fact the limitation of the

rent, to the grantee and his gavelkind heirs, would be void.

9. If the intention be to limit on the original creation, a rent to several successively in tail, it would seem that this cannot be accomplished by a conveyance of the seisin of the lands in fee, to uses giving the rents successively in tail for they would be distinct rents, and several ownerships, and not portions derived out of one ownership, and an entire subject matter, and the second and subsequent attempted estate tail would be void as limitations, after an indefinite failure of issue, and not subject to be previously barred.

10. But if the desire be to create such successive rents, then the grant must first be made of a rent in fee, and the grantee may subsequently create the successive intails therein, for they would be only modifications of a pre-existing ownership.

11. It is usual in limitations of rent charges to limit uses giving powers of distress and entry and perception of rents and profits.

12. It is sometimes said, that this express power of distress is not necessary since the enactments of the 4 Geo. II. c. 28.

13. That is so generally, but there may be an instance where subsequent statutes have given to common law reversioners additional subject matter for their distress, as growing crops, &c. Unless there be an express power they cannot be taken.¹

14. It must be borne in mind that this power of distress can only be exercised as to persons becoming entitled subsequently the limitation of the rent, as in the case of tenants, they are only answerable for the rents reserved

¹ *Miller v. Green*, 2 C. & S. 142; 8 Bingh. 162; *Johnson v. Faulkner*, Jur. 1842, p. 100.

under their leases, and a landlord cannot grant any power of distress against them.

15. In order to give the remedy for the rents reserved on prior leases, a term must be limited to a trustee, (in order to prevent any extinguishment of the rent in the land,) and this termor may pursuant to his trusts execute legal powers as reversioner by distraining for rents when in arrear to satisfy the rent charge.

16. The powers of entry and perception of rents and profits in addition to the power of distress for securing the rent charge will enable the grantee thereof to make a lease *quousque* under which the lessee may enter and make a lease so as to maintain ejectment; see *Havergill v. Hare*, Cro. Jac. 510.

17. These powers of distress and entry, and perception of rents and profits pass at law with the rent without the necessity of any express assignment of the same.

On many of the propositions in this chapter, see Butler's valuable notes to Co. Litt. 271 B., 298 A., and 315 A.

CHAPTER XV.

POWERS.

1. *Powers to give legal ownerships under the statute are future uses, and necessarily contingent until exercised.*
2. *Immaterial where powers introduced in the instrument, whether precedent or subsequent to the uses, to be defeated or postponed thereby.*
3. *Every power is virtually a power of revocation and new appointment.*
4. *Example on the power of appointment in the usual uses to prevent dower.*
5. *Classification of powers by Lord St. Leonards.*
6. *That classification and the chapters thereon seemingly according to the law as formerly understood.*
7. *State of the law on the first publication of Lord St. Leonards' treatise.*
8. *Reasons for the modern doctrine thereon.*
9. *Mode of considering the liability of powers to destruction, suspension, or release.*
10. *Every competent person may release or extinguish a benefit for himself under an ownership or power.*
11. *But cannot derogate from his own act.*
12. *Principles since the abolition of fines and recoveries and of tortious assurances.*
13. *Intention to abandon or release a power may be express or inferential.*
14. *Sale of the estate of a tenant for life with power of leasing.*
15. *Contrasted instance of mortgage by such a tenant for life.*
16. *Effect of a mortgage where tenant for life has power to take fines, &c.*
17. *Tenant for life with power of sale and exchange should not thereby defeat his own act.*
18. *Where he has sold his life estate.*
19. *Where he has only mortgaged the same.*
20. *Result of the authorities according to Lord St. Leonards as to sales or mortgages by tenant for life with power of leasing, or by tenant for life with power of sale and exchange.*
21. *Where mortgagees of tenant for life with power of leasing or with power of sale and exchange has not stipulated against the exercise of such a power.*
22. *Such a mortgagee subject to the rule caveat emptor.*
- 23, 24. *Reasonable implied effect of his nonstipulation against the exercise of the power.*
25. *No substantial injustice if the powers exercised where no stipulation to the contrary.*
26. *Reasons for that conclusion.*
27. *As to registered judgments against tenant for life with power of sale and exchange.*

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| 28. <i>Question thereon on sale of the late Duke of Buckingham's estates.</i>
29. <i>Convenient to consider the law previously to 1 & 2 Vict. v. 110.</i> | 30, 31. <i>Examination of the law thereon.</i>
32. <i>Inclination of the writer's opinion thereon.</i> |
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1. POWERS to give legal ownerships not being authorities at the Common Law, or conferred by Act of Parliament, are future uses. They are virtually *contingent*, for they depend for taking effect on the volition of the donee of the power. They transfer the legal ownership in a manner unknown to the Common Law, and without livery or the necessity of a deed, and without entry they vest the estate to arise under the appointment.

2. It is not of any consequence, in what part of the instrument the power is introduced,—whether previously or subsequently, to the limitation of the uses—which (provided that such power be not exercised,) would confer ownerships.

3. Every power, although not so expressed, is a power of revocation and new appointment, inasmuch as to the extent, that it may introduce a new ownership, it must postpone or defeat what may have been pre-existing.

4. Take the ordinary uses to prevent dower. There is a conveyance of a common law seisin to the purchaser and his heirs, to such uses as the purchaser shall appoint, and in default of and until appointment, to the use of the purchaser for his life, with a limitation on the determination of that estate by any means, to the use of some third person, and his heirs, during the life of the purchaser, and after the determination of these estates to the use of the purchaser and his heirs. Here the power precedes the limitations; but had the conveyance been *instantly* to the use of the purchaser for his life, and so forth with a power

to the purchaser to revoke the prior uses, the result would have been precisely the same.

5. Powers in general have by Lord St. Leonards been classified into *appendant*, *collateral*, or in *gross*, and *simply collateral*.

6. That classification and the chapters in the treatise on powers exemplifying the same chiefly tend to show the understanding upon the law as it stood in time past.

7. When Lord St. Leonards first sent forth this, his greatest work, questions on the suspension or extinguishment of powers were chiefly governed by the narrow rule of tenure. Now that fines and recoveries are swept away and the tortious operation of a feoffment is abolished, there is no longer any reason for the application of such rules. That opprobrium to all law—where the intention is identical—that different results should, to the disappointment of the parties, ensue, according as there may be different properties, *through merely artificial rules, should, where possible, be avoided.*

8. When therefore, for the sake of justice, being the sole object and design of their institution, Courts of Law are allowed to apply equitable doctrines, and Courts of Equity to act by Common Law rules, and examine witnesses *vivá voce*—it seems time that questions of this value should, if practicable, be decided on the proper basis for all jurisprudence—moral justice. That the rule of construction should be governed by this principle—*no man shall be allowed to defeat his own act.* And except where overruling reasons intervene, that the same rules should be applicable, where they can, to the suspension or extinction of powers, whether the same be to operate by way of use, or of trust, or over freehold, copyhold, or leasehold property, £3 per cent. Consols, or railway shares.

9. With respect to the liability of these powers to

destruction, suspension, or release, they may be advantageously considered as regards the ownerships which they can create, or can act upon, determine, or supersede.

10. Every competent person may, by apposite means, release or extinguish a benefit for himself in property, whether that benefit be the result of an existing ownership, or can be obtained by the exercise of a power limited to him, or in his favour.

11. *But no person is allowed to derogate from his own act or grant.*

12. These appear the principles which *now* mainly actuate the courts upon questions of this description—and the technical rules before referred to incidental from their inception to assurances by fine and recovery, or to feoffment—now that fines and recoveries are abolished, and feoffments have become purely rightful assurances, should cease.

13. The intention to abandon or release a power may be *express* or *inferential*, and consequently must vary with the particular case.

14. A power to *lease*, is a power to contract with another for the very *possession*. An assignment, therefore, of the life estate of the donee of such a power, by way of *sale*, must necessarily be a virtual relinquishment of that power, except there be a clear denotation of intention that the same should remain exercisable.

15. But a *mortgage or security* effected, whether by assignment of, or subdemise out of, the estate of a tenant for life with power of leasing, would not *necessarily* be any relinquishment of the power to lease. The dealing with the mortgagee would seem to be, not for the *possession* but for the *income*, and it would not be inconsistent to deem the power exercisable, although the mortgagor retain no longer any estate *at law*.

16. That, however, assumes that the lease is to be at rack or improved rent ; for a power that would allow the donee to take fines, would, by its exercise, lessen the security, and therefore be deemed inconsistent with the prior engagement.

17. As regards powers of *sale and exchange* of land exercisable by a tenant for life or with his consent, of course it is reasonable that he should not thereby defeat his own act.

18. If he have *sold* his life estate, it is not just that he should defeat the bargain which may be for the *very possession*, whether that bargain be effected by conveyance of the whole life estate, or by subdemise for a long term of years, if he should so long live.

19. But on a *mortgage* made either by conveyance or subdemise of the life estate, except *there were a stipulation to the contrary*, it is submitted that it would not be unreasonable, that the power should remain exercisable ; but there is not sufficient legal authority in the decided cases wholly to support that proposition, although there is a leaning to that effect.

20. The result of the authorities according to Lord St. Leonards' 8th Ed. "Powers," pp. 65, 66, and as deducible from the passages in the second chapter of his treatise, or from the decisions seem to be that :—

(1.) A tenant for life with power of *leasing* having *sold* his life estate, cannot exercise the same as against his alienee—for as the sale was to entitle the vendee to the *possession*, the lease would be a derogation from the act of the tenant for life—and as against such alienee the power is *suspended*.

(2.) But the tenant for life may reserve the right to exercise the power, or if he have not so reserved

it, he may exercise the power *with the subsequent assent of his alienee*.

- (3.) A tenant for life with power of *leasing* in possession, except he have stipulated to that effect, cannot exercise the power as against his *mortgagee*, whether the mortgage be effected by an assignment of the whole life ownership, or a grant thereof, but with his assent, the lease may be granted.
- (4.) A tenant for life, by whom, or with whose consent, powers of *sale* were exercisable, if he *sell* his life estate can only exercise the power with the precedent or subsequent assent of his alienee.
- (5.) And a tenant for life with power of *sale and exchange* having *mortgaged* his life estate, whether by assignment or subdemise, can exercise or consent to the exercise of the power with the assent of the mortgagee, either signified in the instrument or subsequently.

21. It appears however to the writer, that *in the absence of any express or implied provision to the contrary*, arguments of some cogency, consistent with general convenience, and not infringing on principles of justice, which, instead of technical reasoning, now influence the Courts on these matters, may be urged that powers of leasing or sale and exchange, by or with the consent of a tenant for life who has *mortgaged*, should be deemed exercisable without the consent of the mortgagee.

22. Every person who accepts the security of a *life interest* must, in the nature of things, be aware that there is an existing instrument creating that estate, and if he neglect to inquire for the same, or to attend to its contents, then the rule *caveat emptor* should apply.

23. If the incumbrancer have knowledge of the contents of such instrument, then he must perceive that there is a power of sale and exchange, the exercise whereof by, or with the assent of, his mortgagor, would, *in this sense*, defeat the security—as that by its exercise, there may be substituted *other* land or *monies or funds*, to be subjected to a like ownership for life, and whereon the charge would attach as against the tenant for life of the same.

24. The mortgagee or other incumbrancer might *expressly* stipulate with the tenant for life that there shall not be any exercise of the power; if he do this, and give to the trustees notice of the security, and of that circumstance, he may prevent the power being exercised without his assent.

25. There appears therefore no substantial injustice in holding that a mortgagee from a tenant for life having a power of sale and exchange, omitting to make such stipulation and to take such precaution, should be considered as having agreed to accept a security upon the *ownership* for life in the *rents* and profits, and in the *monies* to be produced from the sale, and the rents of the land to be purchased or taken in exchange—being the effect of the security in *Warburton v. Farn*, 16 Sim. 625.

26. Why should a contract be *implied* for a party who *might*, but did *not* make it for himself, and *which was not essential to his security*? If it be urged that the monies might be lost on a sale by the act or default of the trustees, that would be an argument against the exercise of the power at all, that might be urged in favour of unborn issue. The existence of the tenant for life's mortgage would not *necessarily* lead to that.

27. It may be convenient, in the next place, to consider the effect of a *judgment* registered pursuant to the 1 & 2

Vict. c. 110, s. 13, against a tenant for life with powers of *sale and exchange*.

28. Upon the occasion of the sale of the late Duke of Buckingham's estates, in the case of *Lord Leigh v. Lord Ashburton*, 11 Beav. 470, the point arose whether a power of sale and exchange, with the consent of the tenant for life, could be exercised as against his registered judgment creditors, but there was not any decision.

29. It will not be amiss to consider how the matter would have stood previously to the 1 & 2 Vict., and then examine into the effect of a non-compliance with the enactments of that statute.

30. If the estate to be sold or exchanged should have been legally settled, the same could only have been disentangled by the exercise of powers of revocation and new appointment expressly given by, or implied from, the power. But the essence is the exercise simply of a power of appointment having in itself the effect of a revocation of the uses of the settlement.

31. Before the 1 & 2 Vict., the exercise of a power of appointment drove out judgments that attached on the seisin in fee; in default of appointment of the donee, both at law and in equity. It is true that in Lord Bolingbroke's settlement, *Goodright v. Cator*, Doug. 477, the tenant for life himself had,—and in other cases, but rarely,—a tenant for life may have *the powers of revocation and new appointment for effectuating the sale and exchange*. But generally, these powers are confided to the trustees, with the consent of the tenant for life; if therefore, before the 1 & 2 Vict., an appointment in fee by the judgment *debtor* would have driven out the judgments against him, why would not such appointment *by third persons*, *i. e.*, the trustees, have the like effect?

32. It may be contended that the enactments of the

1 & 2 Vict. have not varied the case. They only create *in invitum*, at the most an *equitable* mortgage on the land, of which the judgment debtor has a power of appointment for his own benefit, *without the assent of any other person*.

But first the power of appointment is not exercisable merely for his *own benefit*, and secondly it is not exercisable but with *the assent* of the trustees.

And if an express mortgage by an assignment of the whole life estate would not, in the absence of express stipulation to the contrary, or necessary inference, prevent the exercise of the power, why should a judgment, a mere act *in invitum*—and at the utmost a mere equitable mortgage, have that effect ?

It is therefore to be hoped that the decision may be, that registered judgments against a tenant for life, by whom or with whose consent powers of sale and exchange are exercisable, would not be any obstacle to the exercise of the power.

CHAPTER XVI.

COMMON LAW POWERS OF SALE OR MORTGAGE.

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| <ol style="list-style-type: none">1. <i>Every instrument in the form of a bargain and sale not within the Statute of Enrolments.</i>2. <i>Common law powers of sale in devises before the Statute of Wills.</i>3. <i>Operation of such powers.</i>4. <i>When exercisable by the executors.</i>5. <i>Executors, &c., having power but no estate.</i>6. <i>Distinction between bargains and sales and assurances under the Statute of Uses.</i>7. <i>Bargain and sale to one to the use of another.</i>8. <i>The latter not secondary cestui que use.</i> | <ol style="list-style-type: none">9. <i>Bargains and sales as regards copyholds or under parliamentary powers.</i>10. <i>Their operation.</i>11, 12. <i>When heir or devisee must exercise power and mode thereof.</i>13. <i>Effect of death of donee of power in testator's life.</i>14. <i>Purposes of power failing in testator's life.</i>15, 16. <i>Consequences thereof.</i>17. <i>As to rents and profits until exercise of sale.</i>18. <i>Preceding observations applicable to Common Law powers to mortgage.</i> |
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1. It is not every instrument which assumes the form, or has the denomination of a bargain and sale, that is subject to the provisions of the Statute of Enrolments. There is a species of instrument that probably, for want of some other appropriate title has been called a bargain and sale, and which has sometimes been confounded with a bargain and sale, strictly owing its operation for legal effect to the Statute of Uses, and is within the provisions of the Statute of Enrolments.

2. At the Common Law where lands were devisable—as they were by the customs of particular places—it was not

unusual *by last will* to devise that executors or others should sell lands to pay debts, or for other purposes.

3. As there was not in the instance last suggested any devise *to* the executors, the heir-at-law was not disinherited, but the executors or other persons designated were considered to have a mere power of or authority for sale, which when they exercised passed the land to their vendee or appointee, and divested the fee that *ad interim* had descended to the heir.

4. The power to executors or others was generally only given to be exercised for valuable consideration, so that the price of the lands was rendered applicable for payment of debts, maintenance of children &c., and therefore the exercise of the power was necessarily a matter of *bargain and sale* between the executors and appointee.

5. But as the executors had not any *estate* in the lands which they could pass by feoffment, grant or release,—the appointment that they made to the purchaser became ordinarily known as a bargain and sale.

6. This bargain and sale, or this appointment thus called, was however totally distinct from a bargain and sale, or an appointment by means of the Statute of Uses. Such assurances did exist and would have continued to exist, if uses had never been invented, or a statute for remedying their mischief never passed.

7. The bargains and sales or appointments under notice gave a *seisin* to the appointee, and not a mere *use* on the seisin of the bargainor—for the executors who were the bargainors, had not, as before observed, any *seisin* whatever, and therefore such executors might have bargained and sold, or in other words appointed, to A. in fee, to the use of B. in fee, and the Statute of Uses would transfer the seisin which A. had obtained under the bargain and sale or appointment—to B. in fee.

8. B. would not have been a mere secondary *cestui que* use, in like manner as if the appointment or bargain and sale owed its operation to the Statute of Uses, for it is obvious A. himself never was *cestui que* use.

9. This mode of giving powers and of exercising the same, it is well known is usual as to copyholds, and was followed in the former Bankrupt Statutes, and has an analogous operation under Inclosure Acts, Land Tax Redemption Acts and other Acts of Parliament for local improvement, under which the Commissioners of Bankruptcy were, and the Commissioners of Inclosure for redemption of the land tax, &c., are empowered to bargain and sell, convey or dispose of the bankrupt's estate or other property being the subject matter of the particular Acts in question.

10. Neither of these sets of commissioners has any *estate* or *interest* in the property itself, but they are merely armed with a *parliamentary authority*, which, when they exercise, passes the ownership from the bankrupt or other proprietor to the appointee, who thereon takes a seisin subject to the rules of the Common Law, and on which seisin a use might be declared and would be executed into legal estate by force of the statute 27 Henry 8.

11. Where a mere authority to *sell* is given, but the testator does not denote *by whom* the sale is to be made, if the purpose thereof be within the province of the executor, as to pay debts or legacies, or where a blended fund is constituted from the exercise of the power over real and personal estate, and which as regards the personalty could only be accomplished by the permission or through the intervention of the executor, he will take the power.¹

¹ See, on this chapter, Sugd. c. 4, *passim*.

12. But if the donee of the power be not named or referred to, and the purposes of the power do not require the assistance of the executor, then the object of the power must be effected by the conveyance of the heir, or in case of a residuary devise, by such devisee, if competent.

13. If by the death of the executor in the lifetime of the testator or by other means the power, either in the lifetime or after the death of the testator, fail or become extinct, then, should the purposes of the power subsist after the testator's death, the heir or devisee as having the estate will, in a Court of Equity, be decreed to make such conveyance, as will effectuate the purposes of the power.

14. But as the discretion was not in the case of the extinction or failure of the power given to the heir or devisee, it would seem that except the 29th section of the recent statute 23 & 24 Vict. c. 145, apply, the heir or devisee cannot give a discharge for the purchase money. Of course if the persons who are to be entitled thereto are competent, they can receive the same, and the legal fee passing by the conveyance from the heir or devisee—assuming it to have been vested in the testator—there would be a good title at law and in equity.

15. Where the purposes of the sale have failed in the testator's lifetime, then if the will was made before the 1st of January, 1838, there would be a lapse for the benefit of the heir-at-law, notwithstanding that there should be a residuary devisee, *Doe v. Underdowne*, Willis 296 ; but if the will was made after that day, then by the 25th section of the 1 Vict. c. 26, the residuary devisee, if there be one, would be entitled to the benefit of the lapse.

16. But whether the will was made before or after that day, if the purpose of the power should fail *after the*

testator's death, the residuary devisee would take the money, *Doe v. Scott*, 3 M. & S. 300.

17. The rents and profits from the death of the testator until the sale belong at law to the heir or devisee—but in equity they will be applicable for the purposes of the power, *Yates v. Crompton*, 2 P. W. 311.

18. The preceding observations will apply *mutatis mutandis* to Common Law powers to *mortgage*.

CHAPTER XVII.

OPERATION OF USES ON AN ORDINARY MARRIAGE SETTLEMENT BY TENANT IN FEE SIMPLE, OR BY TENANT FOR LIFE, WITH REMAINDER TO HIS SON IN TAIL.

1. *Practical example of the operation of uses on an ordinary marriage settlement.*
2. *Such settlement not always by owner in fee, but often by father seised for life, son in tail.*
3. *In the latter instance, the usual course to effect disentailment by distinct instrument.*
4. *Practice before the 3 & 4 Will. 4, c. 74, where a recovery was suffered.*
5. *Tenant for life or his incumbrancer having the freehold must have concurred in making tenant to the preeipe.*
6. *Inconvenience of that necessity.*
7. *New law introducing the protector—the aid of incumbrancers not required.*
8. *Benefit of the new system.*
9. *Where tenant for life has powers annexed to his estate advisable not to convey, but merely consent as protector.*
10. *Ordinary course—subject to father's life estate and attendant powers to limit according to the joint appointment of father and son, and in default thereof to father for life and son in fee.*
11. *Ancient plan in default of appointment to limit to the old uses and reasons for the same.*
- 12, 13. *Order of limitations in the settlement.*
14. *The settlement exemplifies the practical application of uses under the statute.*
- 15, 16. *As to uses until the marriage.*
17. *Indestructibility of uses subsequent to the marriage.*
- 18, 19. *Consideration of means of so doing by right or by wrong.*
20. *Disclaimer of grantee to uses cannot prevent their arising.*
21. *Effect of marriage on uses.*
- 22, 23. *As to estate of tenant for life.*
24. *As to powers limited to tenant for life.*
25. *Powers of sale and exchange.*
26. *Powers to jointure after taking wife or appoint portions.*
27. *Jointure rent charge for intended wife.*
- 28, 29. *Powers of distress and entry for securing the same.*
30. *Term of years for raising jointure when in arrear.*
31. *Modern plan to limit one term for securing jointure and raising portions.*
- 32, 33, 34. *Trusts thereof.*
35. *As to raising portions.*
36. *Trusts of these terms introduced generally after limitation of uses.*
37. *Indemnity to purchasers and mortgagees.*
38. *Power to change trustees.*

39. *Covenants for title.*

40. *Persons who may take powers.*

41. *Usual practice formerly to assign attendant terms.*

42, 43, 44. *Technical operation of uses in settlement.*

45, 46. *The real operation thereof.*

1. A PRACTICAL example of the operation of the law of uses may be given in the scheme of a settlement of the landed estate of an English family of the middle class.

2. That settlement is not always made by an owner in fee simple, but frequently occurs in the marriage of an eldest or only son, where the lands stand limited to the father for life with remainder to the son in tail with limitations over.

3. In such a case, the first step would be to bar the estate tail, and the remainders over. That is best effected by a preliminary assurance—to be enrolled—without incorporating therein the limitations of the proposed settlement.

4. As matters stood before the 3 & 4 Will. 4, c. 74, the father and any incumbrancer on his life estate, having the *freehold* thereof, *at law*, must have joined in conveying the very freehold to a tenant to the precipe, for a recovery.

5. That statute has very beneficially put an end to the difficulties often attendant on such a transaction. So that now, without regard to the narrow technical rule, that the seisin in possession could only be recovered from the owner of the actual freehold, and which in many cases rendered necessary an actual conveyance of the life estate of the father, the estate tail may be barred.

6. Frequently too this required the reluctant concurrence of incumbrancers, who stipulated, as the price of such concurrence, that the charge on the father's life estate should also be thrown on the inheritance of the son.

7. The statute has—to adopt the expression of Black-

stone—"by a noble alchemy"—converted this necessity for the concurrence of the owner of the freehold into a salutary process, and dealing with such a transaction, according to the probable course of human action, it has considered that, in the majority of instances, a father is tenant for life, and naturally is the guardian and judge of the family fortunes. It has therefore not allowed the son, in the father's lifetime, without his consent, to bar his younger brothers or alien the property. It has generally made the tenant for life, protector of the settlement creating the estate tail.

8. The mode adopted therefore is, that the son makes the disentailing assurance, with the consent of his father *as protector*, without requiring the actual conveyance of the latter, or that of his incumbrancers. Nay, this is so, although the property be mortgaged beyond the value of the life estate. And it is morally just, for the incumbrancer of the life estate cannot have any claim upon the ulterior inheritance, except the father should chance to have the reversion in fee, and have charged the same.

9. The father may, if he think fit, concur in the conveyance forming the disentailing assurance, but generally this is inadvisable. There may be administrative or family powers, annexed to the life estate, which it would be desirable to retain; and it is better to preserve them by abstaining from any conveyance than to relimit the life estate with the attendant powers, under a declaration of uses to that effect in the disentailing assurance,—"*quieta non movere*."

10. The ordinary course, on this preliminary bar of the entail, is subject to the existing life estate of the father, and any attendant powers,—to limit the lands to such uses as the father and son shall jointly appoint, and in default of such appointment, then, if the father join in the convey-

ance, to the use of the father for his life (restoring former or giving *new* powers to him), with remainder to the son in fee; but if the father have not conveyed, then—in default of the joint appointment, to the son in fee, because such power would only be a power of appointment of the *reversion* in fee expectant on the father's existing life estate.

11. The ancient plan was, whether from distrust of the son or for his protection against himself, in default of an exercise of this joint power of appointment—to limit the land to the old uses, so that the son might not, as he could, first destroy the *joint* power, and then make an alienation of the remainder in fee acquired by the disentailment, and as if the joint power had never been limited.

12. We will now consider the construction of the settlement, and chiefly as regards one by a tenant in fee simple, so as to show its actual operation under the statute.

13. According to the order of the limitations, the conveyance will be to a grantee in fee (being of the old Common Law seisin), to the use of the grantor and his heirs, till the marriage; and from that event, then to the uses after expressed, that is to say—to the use of the settlor for his life, with or without impeachment of waste, as the intention may be,¹ and after his decease, to the use that his bride, if she survive him, may thenceforth during her life take an annual rent charge, with powers of distress and entry, and perception of profits for recovery of the same, and subject thereto, to the use of trustees for a term (generally of) 100 years, upon the trusts after declared, for securing such rent charge, and subject thereto, to the use of other trustees for a term of (say 1000) years, upon the trusts for raising portions for the children

¹ Formerly an estate *pur autre vie* to preserve contingent remainders was here introduced, but is now needless.

of the marriage (other than an eldest or only son), subsequently declared,—and subject to these terms of years and the trusts thereof,—to the use of the first and other sons of the marriage successively in tail male, or tail general as the case may require,—but if in tail male, then with remainder to the first and other sons in tail *general*,¹ with remainder to the daughters of the marriage as tenants in common in tail general, with cross remainders among them in tail general, with reversion to the settlor in fee ; then follow the trusts of the term of years limited for securing the jointure rent charge and also the trusts of the term of years limited for securing the portions, and there may be added, if required, power for the settlor to jointure a future wife, and to appoint portions for the children of a future marriage.

14. Now, this settlement seems to exemplify nearly every portion of the practical application of uses since the statute,—with the exception of the doctrine that there cannot be a use on a use so as to operate, as to the secondary use, by passing the legal ownership thereto.

15. The first limitation in the settlement is *to the use of the settlor and his heirs, until the marriage*. That is a *determinable* fee, on an event which must happen within a life in being, and therefore not contravening the rule against perpetuities.

16. This limitation is but an express declaration of what the law would imply, if omitted, and as if the declaration of uses of the assurance had commenced, with the uses to arise after the marriage. Indeed whether the settlement be by settlor seised in fee,—or by a father tenant for life, and his son in fee—upon the marriage of the latter—the resulting uses would—until the marriage,—have been governed by the prior ownerships, and con-

¹ This lets in daughters of the sons before daughters of the marriage.

verted into estates by the statute, and given back legal ownerships for life, reversion or remainder in fee, defeasible however by springing or shifting uses after the marriage, for the purposes of, and to the extent of the uses declared by the settlement.

17. It is confidently submitted that nothing which the settlor seised in fee—or the settlor's father seised for life, and so on seised in fee in remainder—could attempt would defeat these springing uses.

18. Every conveyance which they could make operating rightfully, or could have made before the recent enactments, to operate *by wrong*, must have been ineffectual.

19. And first as regards any *wrongful* assurance, when the law recognised them—the father and son would by the statute have taken legal estates commensurate to their prior ownerships, preliminary, or subject to, the *springing* uses that were to arise on the marriage—consequently as being *themselves* in the seisin for such determinable ownerships, they could not have disseised themselves: and as to any persons to be entitled under the springing uses after the marriage, inasmuch as such persons could not intermediately have been entitled to seisin, any fine consequent on, or forming part of such *wrongful* assurance could not operate to *bar by nonclaim*, and could not have any greater efficacy, than if levied after the marriage, when the uses must have arisen. And secondly any *rightful* assurance by the father and son, would only have operated on the fee determinable upon the marriage; when the uses limited thereon would arise, and would defeat the attempted alienation.

20. Nor can a disclaimer by any releesee or grantee to uses have any effect, in defeating the uses, for the statute executes the uses *instantly*, and the disclaimer comes too late. It may indeed have operation as to any use *that*

would have been executed into legal estate, in favour of the grantee or relessee disclaiming.

21. When the marriage is solemnised,—the uses previously and intermediately executed into legal ownership,—whether in consequence of express declaration or by resultancy, determine,—and the uses to arise after the marriage, have effect—so far as they can give present or immediate ownerships.

22. The tenant for life takes instantly *at law* his life estate, and annexed to it these powers, that he may exercise, whether in defeasance or supercession of, or to operate during his life estate, and being termed powers *appendant*.

23. There may be also given to him other powers, either expressly or inferentially, in his character of tenant for life, that are not to operate on, but only *subsequently* or *subordinate* to, his estate for life. As to a power to jointure an after taken wife, or to charge portions to become payable after his death, or to raise a sum of money to be levied after his decease—these are called power *in gross*.

24. Each of these powers is virtually an ownership and which he may release or extinguish. Those that operate on his life estate may be *inferentially* released or discharged, by the conveyance on sale or mortgage of his life estate, for it would be a manifest injustice except he *reserved* a right to exercise such power; or it can be *inferred upon his mortgage*, that the power notwithstanding was to be exercisable, that he should exercise such power after he had aliened, so as thereby to charge the land to the detriment of the vendee or mortgagee.

25. So, also, if there be powers of sale and exchange by or with the consent of the tenant for life, unless expressly he reserve the right inferentially, he would not be

at liberty to put the power into activity against his own alienation, on sale or *possibly* by way of mortgage.

26. But a power to jointure or to appoint charges after his death would not be open to this objection and might still be exercised, although he had parted with his life estate, since by such exercise he would not derogate from his own act.

27. Immediately after the determination of the estate for life, a rent charge by way of jointure was, it will be recollected, to be limited by way of use for the intended wife, if surviving her husband. The 4th section of the Statute of Uses expressly provides for the seisin of the rent, and the enjoyment of the *powers of distress and entry* for recovery thereof in like manner as if they had been *really granted*.

28. It must however, as heretofore observed,¹ be borne in mind that these powers of distress differ from the remedies by way of distress given *by law*, to a reversioner on a lease. They are only binding as against persons coming in, after the limitation of the rent charge, otherwise than through the exercise of the powers of the settlement. Where leases are granted pursuant to the powers of the settlement, the lessees are as much *cestuis que use*, as the jointress herself; and therefore, as against such lessees, she cannot distrain,—for these leases are paramount not merely to the jointure, but to every ownership under the settlement. But as regards every subsequent owner under the settlement, and every person acquiring any interest by means of such ownership, the jointress can distrain for her arrears; so, she may as to lands received by way of exchange, or purchased and conveyed under the power of sale and exchange to the uses of the settlement under the limitation of the land so

¹ See p. 11, ante, division 7, s. 14.

purchased or received in exchange to the use of the settlement.

29. But not being in the seisin and having only a charge thereon, she is not *quasi* reversioner on the leases under the power, and cannot distrain.

30. It is for that reason, and in order to give additional remedies to the jointress—should all the lands be, as they may be leased under the power of leasing,—that a term of years is limited, upon trusts to secure payment of the rent charge.

31. The modern plan for preventing the inconvenience of multiplying trustees—and as the portion for younger children must be subject to the jointress' annuity—is to limit *one* term for securing both; and which, as the jointure rent charge and the provision for younger children are to be charges on the inheritance,—precedes the limitation of the inheritance intended subsequently to the estate or estates for life.

32. That term therefore is limited, as before remarked, previously to the estates tail,—to the first and other sons upon trust to raise these charges on the inheritance—and which term, and the charges thereunto, such sons, by reason of their ownerships in tail, can never overreach.

33. Under that term the trustees thereof—when the prior life estate of the husband has determined, become the immediate reversioners on all leases, that may have been, or may be granted, in exercise of the power of leasing.

34. The trusts of such term are, when the jointure rent charge is in arrear, for a given period—by means of the rents,—distraining for the same, or by sale or mortgage, *or* all or any of such means (for if they were simply in the disjunctive it seems *one* remedy only would subsist) to raise the arrears and expenses. Of course there is rarely

any sale of the property for raising the jointure rent charge ; but if the rents are not sufficient to meet the charge (and which is not so in an ordinary case, since the amount of the yearly rent charge is generally measured by the amount of the rental) then the trusts for sale on mortgage may be put in force—in order to satisfy the arrears.

35. So, when the portions become payable, similar means are provided for levying the same ; and, subject to these trusts, the trustees of the term are to allow the rents to be received by the persons entitled under the limitations of the settlement.

36. The trusts of this term are however generally introduced after the series of limitations, in order to preserve continuity of purpose—and to let the uses take precedence (for the powers of distress and entry are uses)—and then come the trusts,—and afterwards the powers.

37. There is also, on the rule of a Court of Equity, that where the same can be, it shall be done (except there be an express authority to the contrary) ; that the money shall be seen to go into the right pocket,—a clause indemnifying persons paying monies under the trusts of the term, from seeing to the application of the monies raised.

38. There should be added a power to change trustees. This power must carefully provide for every event on which its exercise may be advisable, as death, refusal to act, declining to continue, or as is sometimes done, disclaimer or incapacity. The two latter contingencies often induce inconveniences which could only be explained at greater length than advisable. The settlement should also designate the person or persons by whom the power is to be acted on ; generally that is by the tenant for life in possession, or by the husband, and after his decease, by the wife, if surviving, and then by the surviving, con-

tinuing or last acting trustee, or the executors or administrators of the last acting trustee. Great care must be taken in the preparation of this power, for it frequently happens that powers of sale and exchange have been acted on by persons not duly appointed trustees, and difficulties and expense ensue therefrom. The Trustee Acts profess to remedy any omission in this respect; they appear a frightful vortex of doubt and difficulty, and require entirely recasting.

39. When covenants for title are entered into, the same should be with the grantees of the seisin, and their heirs and assigns—and, inasmuch as being covenants real, as before the statute they would have passed with the land on an actual conveyance by such grantees to the *cestui que* use—the passing of the seisin to the uses, by force of that statute, must have the same effect; a *cestui que* use therefore thus acquiring the legal ownership, has in respect of that ownership, the same right under his covenants, as if an actual conveyance had been made in his favour.

40. Doubts are sometimes entertained by persons not conversant with these subjects,—whether powers can be given to strangers to the seisin; such powers may be given to any one capable of taking to a use—but of course they should not be confided to any persons whose interest may be adverse to their duties.

41. Formerly and before the statute 8 & 9 Vict. c. 112, rendering unnecessary the assignment of attendant terms, it was on settlements of any importance deemed of moment that such terms should be assigned upon trusts subservient to the settlement.

42. A glance has thus been taken of the plan and effect of an ordinary marriage settlement, mainly through the medium of the Statute of Uses. It may be convenient to review its technical operation.

43. The common law seisin is conveyed to two persons, or it may be to one person. If there had not been any Statute of Uses such grantees or grantee would have retained the *legal* ownership ; and, the uses declared would have remained trusts, precisely as if the conveyance had been unto *and to the* use of such person or persons in fee for the prescribed uses or trusts—and giving ownerships which would have been only cognisable in a Court of Equity.

44. But the statute operates by way of conveyance from such grantees to uses, *in præsentî*, if the uses are to take effect in fixed persons and on certain events after the marriage,—and by way of futurity or contingency on the uses declared in future, to arise on an event or in favour of a person not born or ascertained.

45. But to view properly the effect of such uses, we will suggest them.

46. They are virtually, and in effect,—to such uses after the marriage, as the persons authorised to *lease* may conformably to the provisions of that power, appoint—and in the meantime and subject to the estates to be limited under that power (and which are never to be displaced, and are to continue notwithstanding any subsequent appointment), but with the benefit of the rents reserved on such leases—to such uses for effectuating any sale to any purchaser or purchasers—or any exchange according to the provisions of the power of sale and exchange after contained—as the persons intrusted with such powers may appoint ; and, in default of, and until such appointment, by way of lease—and subject thereto—and with the benefit of the rents on such leases—and also until such appointment by way of sale or exchange—to the use of the tenant for life, and so on,—according to the uses subsequently declared—and the other powers.

CHAPTER XVIII.

ON MODERN CONVEYANCES.

1. *An assurance by feoffment, lease and release, bargain and sale enrolled, now unnecessary.*
2. *But they are not abolished.*
3. *Instances where feoffment and lease and release can be now used.*
4. *Also a covenant to stand seised.*
5. *Cases where assurances that would otherwise have failed were supported as covenants to stand seised.*
6. *Instances where bargains and sales enrolled were adopted.*
7. *Feoffment, lease and release, bargain and sale enrolled, will soon only form arguments for analogy.*
8. *Instruments called bargains and sales not requiring enrolment.*
9. *Such an instrument may still be by writing not a deed.*
10. *On bargains and sales before the statute, a use raised for trifling consideration and a fee passed without words of inheritance.*
11. *Now words of apt limitation requisite.*
12. *General analogy of interference of equity to effectuate a contract since, as previously to the statute.*
13. *But a conveyance by bargain and sale enrolled or grant, although passing the legal ownership, but not for valuable consideration, defeasible by sale of the bargainor or grantor under the statute 27 Eliz. c. 4, although the purchaser have notice.*
14. *This important distinction, that equity would not interfere on a bargain and sale unenrolled and not supportable before the 8 & 9 Vict. c. 96, as a feoffment, release, grant, or covenant to stand seised.*

1. ANY assurance by feoffment, by lease and release, by bargain and sale enrolled, or by covenant to stand seised, has become *unnecessary* in consequence of the enactment in the 2nd section of the 8 & 9 Vict. c. 106, for the amendment of the law of real property that "All corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to be in grant as well as in livery."

2. But neither of the above mentioned modes of assurance is abolished. An owner in fee simple in possession of a corporeal hereditament may still, if he choose, incur the needless trouble or expense, and convey by feoffment with livery, taking care that the assurance be by deed,¹ in consequence of the 3rd section of the last mentioned Act. Previously to that enactment, a *writing* only, would within the Statute of Frauds have been effectual. There was however this exception, that where a power of attorney was introduced, to give or receive livery of seisin, there a *deed* was requisite.

3. So at the present day, there may be a conveyance of the fee simple of corporeal hereditaments, by means of a bargain and sale, or lease for a year, for 5s. or other nominal consideration (not requiring enrolment as not having to pass the freehold), or by lease, at the Common Law—and entry thereon—and afterwards in either case, by a supervening release of the fee simple.

4. And where a wife or child is to be benefited, or there is the consideration of blood or marriage, there still may be an assurance by covenant to stand seised,—but each of the assurances which may thus still take effect, would be merely a mark of caprice.

5. Indeed an assurance of this nature, had latterly become obsolete, from its inaptitude for trusteeships in strangers in blood. Still the law thereon was occasionally resorted to, where—for want of livery of seisin, or a precedent lease for a year,—or through non-enrolment of an instrument intended to be a bargain and sale,—the proposed assurance of corporeal hereditaments in possession would have been inoperative. In such instances, the Courts rather than that the instrument should fail, construed the

¹ In the case of an infant conveying by the custom of gavelkind, a deed is not requisite.

same, not according to its primary import, but would deem even a surrender where *extinction* of an estate was intended, to be a *continuance* of that estate, if the consideration of blood or marriage existed, and support the same, as a covenant to stand seised, raising uses to be executed by the statute, for upholding the intended transaction.

6. But a bargain and sale, to have efficacy under the Statute of Enrolments, was seldom used in recent times. It sometimes was resorted to for making a tenant to the *præcipe*, for a common recovery or where land was to be vested in trustees for sale in lots, and an office copy thereof would be evidence. Formerly it was also usual in large transactions, to take a conveyance, by a bargain and sale enrolled—as well as by lease and release—but that practice has long been discontinued.

7. The assurances by feoffment, by lease and release, by bargain and sale, enrolled or by covenant, to stand seised, will soon be of the past ; and such modes of operation will be remembered only for the purposes of argument from analogy.

8. But every instrument in the form of a bargain and sale was not an assurance operating through the medium of the Statute of Uses. A bargain and sale of freehold or copyhold by executors or others under a common law power in a will, the bargain and sale which took place by commissioners of bankrupts, or an instrument enrolled pursuant to the requisitions of the Fines and Recovery Abolition Act, were neither of them bargains and sales within the Statute of Uses.

9. A bargain and sale, or appointment in exercise of a common law power to sell, &c., may be by mere writing.¹ The 8 & 9 Vict. c. 106, has not provided that it shall be

¹ 3 Pres. Abs. 113.

by *deed*. In this instance, and under a power to appoint by writing—a fee simple may be passed without deed.

10. The bargain and sale to which the Statute of Enrolments applied, was, as previously remarked, before that statute a mere contract for the sale of real hereditaments. It might or it might not have been in writing. It was not requisite that it should specify the quantity of ownership to be taken by the vendee or bargainee. If money or money's worth were given or to be given, the Court of Chancery would enforce the contract, but consider the vendee as entitled to the use or ownership subject to the lien for the price and that use, although a use by implication was executed by the statute ; but to prevent the mischief of the statute thus effecting conveyances of land at law, even without writing, livery or attornment, the Statute of Enrolment as previously observed was passed.

11. But now, since that statute words of limitation must be used to show what quantity of interest be taken by the bargainee.

12. There is no doubt a general, but not a strict, analogy between the interference of a Court of Equity, upon contracts before the Statute of Uses and contracts subsequently thereto. A pecuniary consideration was requisite in each case ; but in the former, however small the same might have been, whether five or ten shillings, it would have raised a use, as in the ordinary bargain and sale, for a year.

13. But although a bargain and sale of lands in fee of whatever value,—if enrolled in due time, as well as a grant would still pass the legal fee to the bargainee by force of the Statutes of Uses and Enrolments ; such would be only its *legal* effect,—and unless the transaction could be supported for an *adequate valuable consideration* (as an intended marriage), it would be deemed *in Equity* a volun-

tary conveyance ; and also by force of the Statute of Purchases, 27 Eliz. c. 4, might be avoided by conveyance from the bargainor to a purchaser—although with notice of the prior bargain and sale or grant.

14. Nay, there was also this important distinction—that although previously to the Statute of Uses the Court of Chancery would, on a bargain and sale for a trifling pecuniary consideration have considered the bargainee to be entitled to the use of the lands, and decreed a conveyance to such *cestui que* use yet, where there was a bargain and sale *not* enrolled in due time, and incapable before the 8 & 9 Vict. c. 96, of being supported as a feoffment, release, grant, or covenant, to stand seised a Court of Equity would not, in the absence of a substantial valuable consideration, have implied a *trust* analogous to the old *use* in the bargainee, or have directed a conveyance to him.

CHAPTER XIX.

ON THE ORDINARY USES TO PREVENT DOWER.

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| <ol style="list-style-type: none"> 1. <i>Mystification of common sense thereby.</i> 2. <i>Reasons why a widow not dowable, where by intervening estate of freehold between life estate of husband and his ulterior fee.</i> 3. <i>The case of Duncombe v. Duncombe.</i> 4. <i>The Judges there do not seem to have adverted to the reason why such intervening estate prevented dower.</i> 5. <i>The intervening estate there ought not to have prevented dower.</i> 6. <i>Dormer v. Parkhurst.</i> 7. <i>Submission that in fact the limitation there was in reality not vested but contingent.</i> 8. <i>Argument for that conclusion.</i> 9. <i>As to a tortious act being a natural determination of an estate for life.</i> 10, 11, 12. <i>Suggestion on Mr. Fearne's reasoning.</i> 13. <i>Examination of the possibility of the prior estate determining being a grantable estate.</i> | <ol style="list-style-type: none"> 14. <i>Semble that such estate cannot now arise.</i> 15. <i>The case of Collard v. Roe.</i> 16. <i>Decision of equity judges therein.</i> 17. <i>Suggestion that the decision in Mole v. Smith might have influenced the judgment in that case.</i> 18. <i>Mr. Hoppley White's observation on the intervening limitation.</i> 19. <i>Under the limitation to preserve contingent remainders the concurrence of the trustees might equally have been required.</i> 20. <i>Reason for the interposed estate.</i> 21. <i>But where a preceding power of appointment unnecessary according to Ray v. Pung.</i> 22. <i>Observations by Lord St. Leonards of inexpediency of the Declaration that the wife shall not be dowable.</i> 23. <i>Power of appointment advisable.</i> |
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1. PERHAPS never has common sense been so mystified by legal subtleties, as in these celebrated uses,—which in process of time, have been declared of every portion of freehold land in England, not holden by the Crown; and probably never were uses thus upheld by lawyers of the highest eminence, in reality, so little supportable upon

principle. It may appear presumptuous so to propound, but a little examination will it is apprehended, show there is some ground for such a proposition.

2. A widow upon her husband's death, by the law of England, became entitled thenceforth for her life, by way of dower, to one third part of the real hereditaments of socage tenure to which issue born of the marriage might inherit, of which her husband was legally and solely seised in fee simple, or fee tail, during the coverture, without there being in any other person, any preceding vested estate of freehold or any intervening estate of freehold, between the freehold of the husband, and his ultimate fee simple or fee tail in the property. Now the reasons of these distinctions are obvious; there must not be any vested estate of freehold *prior* to the fee, or *intervening* between the freehold and fee in expectancy of the husband subsisting at his death, and the reason of this was obvious, as the widow's dower is *then* to commence on the death of her husband; and to entitle her to dower, if there were such estate, would be to rob the then owner of the freehold of one-third thereof,—so, the husband must be *solely* seised, for if he held the freehold or the inheritance in joint tenancy, at his death the widow's dower would interfere with the *jus accrescendi* of the surviving joint tenant.

All this is reconcilable with justice and sound reasoning.

3. But in the reign of William III., there was a case, *Duncombe v. Duncombe*, reported 3 Levinz, 437, where a married man had an estate for his life,—then came an estate to another, for the husband's life, with remainder to his heirs male of his body, remainder to a brother on the death without issue of the husband. The widow sued for her dower, but the Court, as the reporter states hastily

upon the first argument, gave judgment for the tenant in tail in remainder—and thus held that the widow was *not* dowable.

4. It does not seem to have been urged, or considered that the reason why an intervening estate for life in another, than the husband, should prevent the dower, was in truth, because it would have infringed on an estate for life, which would then devolve on the remainderman for life ; nor was the fact adverted to, that, when the intervening estate had determined by the death of the husband, no wrong could be done to any *third* person, by giving the widow her dower.

5. This intervening limitation in *Duncombe v. Duncombe*, which had the effect of preventing the widow's dower, is the same as the now needless limitation to trustees during the life of a prior tenant for life, to preserve contingent remainders.

6. With every deference to the judges who ruled for the vesting of the limitation in *Dormer v. Parkhurst*, and to the profound learning and ingenuity of Mr. Fearne, it may be submitted that there are strong reasons for considering, that, on principle, the limitation was contingent.

7. The tenant for life might die, without committing any act of forfeiture, and surely that *act* was a mere *contingency*. Now, suppose a limitation to A. for his life, and if A. go to Rome, then to B. and his heirs thenceforth for the life of A., there is no more certainty of A. creating a forfeiture, than of his going to Rome.

8. If an argument for the vesting be the probable or possible determination of A.'s life estate by his surrender thereof, that begs the very question ; because as a surrender must be to the next vested estate in remainder, of equal quantity with or greater quantity than the estate to be

surrendered, it appears merely arguing in a circle, that A.'s estate may be surrendered, because B.'s estate in remainder is vested, and that B.'s estate is vested because A.'s estate may be surrendered. To shew that there may be a surrender, it must first be *proved* that there is a vested estate to be surrendered.

9. The observation sometimes is made that the cesser of the life estate is in its *natural* determination, but surely the *natural* determination of an estate for life, seems the *death of the tenant for life*, and not his committing a *wrong*.

10. If there be an estate to A. for his life with remainder to B., for the life of A., provided A. go to Rome, it never can be said that the estate of B. is a *vested* remainder. The intention is to determine the estate of A., upon an act of his volition, and so is his committing a forfeiture or surrendering (if surrender he can), equally an act of volition; and if the text be as propounded by Mr. Fearne, Butl. Edn. 216, that the present capacity of "taking effect in possession, if the possession were to become vacant, and not the *certainty* that the possession will become vacant, before the estate limited in remainder determine, that universally distinguishes a vested remainder from one that is contingent." Surely the capacity of taking effect in possession may as much hinge on A.'s going to Rome, as on his forfeiture or surrender.

11. There is also a subsequent passage in Mr. Fearne's treatise, that "upon a careful attention to the subject, we shall find that wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained that the preceding estate may by any means determine before the expiration of the estate

limiting the remainder, such remainder is vested." May it not be observed, what more *certainty* is there that A. shall make a forfeiture or surrender, than that he shall go to Rome. Each is an event which has not happened, but may, but will not *necessarily* happen.

12. And then as regards the succeeding observation, "On the contrary wherever the preceding estate (except in the instances before noticed as exceptions to the descriptions of a contingent remainder), is limited so as to determine only on an event which is uncertain, and may never happen, or wherever the remainder is limited to a person not *in esse*, or not ascertained, or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate, the duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." It may fairly be suggested that A.'s forfeiture or surrender of the tenant for life, is an event which is as *uncertain*, and may never happen, as his going to Rome.

13. The possibility of this fractional ownership ever entitling the grantee, is indeed now very problematical. By the old law, if tenant for life enfeoffed over, assuming to pass more than his life estate, or levied any fine other than *sur concessit* or *de droit tantum*, or suffered a common recovery, or accepted a fine from a stranger, or did any act disclaiming the reversioner, *it was a ground of forfeiture*.

14. But fines and recoveries being abolished, and by the 4th section of the 8 & 9 Vict. c. 106, the tortious operation of a feoffment being removed, there cannot be any determination by *forfeiture*, through a fine, feoffment, or recovery, and as to the same being the result of disclaimer of the reversioner, the ultimate fee is in the tenant for

life himself; and even any remedy for the commission of *waste*, if that could be ground of *forfeiture*, generally is only with the owner of the inheritance, who is also the tenant for life. So that now every means of determining A.'s life estate is taken away; and with regard to his estate ceasing by surrender, it will be necessary, first to show that the estate to the trustee can take effect, and if it cannot, there is not any remainderman for life, capable of taking a surrender.

15. In *Collard v. Roe*, Jur. May 22, 1858, freehold property had, in 1841 (four years previously to the passing of the 3 & 4 Will. 4, c. 105) been limited to the then vendor (but without any preceding power of appointment) for his life,—*with a limitation to a trustee after the determination that estate by any means* with remainder to the vendor in fee. On a bill for specific performance, the objection that the trustee (who was out of the country) did not convey, prevailed—so far—that an order was made under the Trustee Act for the conveyance of his estate; but no costs were given to the purchaser. And on an appeal, 4 De Gex and J. 525, the Lords Justices considered the objection was frivolous and vexatious, and that costs should not be given to him.

16. The Equity Judges thus declared, and with truth, that the objection was frivolous and vexatious. But may it not be observed that there was good ground for decreeing performance with costs against the purchaser. No one ever heard of such an estate taking effect *in possession*, the trustee could only have recovered in ejectment, he would have been enjoined thus proceeding, and if he had recovered would have been a trustee for the purchaser, and been compelled to convey.

17. The principle of the decision in *Mole v. Smith*, 1 Jac. & W. 665, would seem to have justified the Court in

such a proceeding. There, a widow was actually dowable, but a purchaser was bound to take the title, on the protection of the assignment of an attendant term, and the widow, who herself had the term as personal representative of the last owner thereof, was decreed to make the assignment, in order to exclude her own dower; nay, although she might have recovered *at law*, yet on the ground that the equity would have *enjoined* her proceeding, and, notwithstanding the possibility of the clear adverse title (and not being of such a shadowy nature as in *Collard v. Roe*), Lord Eldon considered there was a good title, and decreed performance.

18. There is also another ground suggested in Mr. Hopley White's valuable edition of Watkins' Principles, p. 281, that "the concurrence of the trustee in future conveyance is unnecessary, as it may be contended that he is a volunteer, and therefore that his estate is void as against a subsequent purchaser for value."¹

19. But in the analogous case of the estate to the trustee to preserve contingent remainders, where the prior tenant for life concurred with the first tenant in tail in making a tenant to the *præcipe*, for a recovery; the objection was never raised, that there might have been a forfeiture, as the estate might have gone over to the trustee, and the recovery would have failed, by reason that the trustee did not concur, and so there was not a good tenant of the freehold.

That was a much more important result, and went to the vitality of the transaction.

20. The expediency of this interposed estate which formed part of the uses in default of appointment, seems principally to have arisen from the doubt whether an

¹ But quære—Was the Statute of Purchasers ever applied to a conveyance to one—in trust for the settlor—would it be more than a mere legal estate outstanding?

appointment under the power would drive out the right to dower which had attached.

21. But when in *Ray v. Pung*, 5 B. & Ald. 561; 5 Madd. 310, it was decided that the appointment would have had that effect, there appears to have been no further reason for the interposed limitation, save the adherence to a common form. Now, however, by the 3 & 4 Will. IV. c. 106, the wife's dower is completely at the command of the husband, if she have been married on or after the 1st of January 1834, and he may exclude the same by conveyance or his will—sects. 4 and 7—or by his contract or charge—sec. 5—or by his declaration at any time.

22. Lord St. Leonards, in the eleventh edition of his *Vendors and Purchasers*, p. 545, has suggested that there should not be a declaration inserted in conveyances to bar a future wife of her dower, unless there be express instructions, since the right being in the husband's power, this declaration may have effect against an unknown heir. In the thirteenth edition probably for the sake of compression, that passage is omitted, but it appears to be a just observation. Whenever therefore there is not a wife who would be dowable, notwithstanding the act, it may be sufficient in future to introduce the ordinary power of appointment, and limit the fee to the purchaser in default of appointment. If he be a bachelor, to add that to his description. If he be a widower, then to state either in his description or by distinct recital “*That [] his wife theretofore [] spinster, to whom he was married at [], on [], having died on [] and been buried at [].*” Or if he married on or since the 1st of January 1834 then to add the recital. “*That [the purchaser] was married to [], his now wife, at [], on [].*”

23. The power of appointment may be useful. There are instances of this within the writer's knowledge. The registry of a judgment is not *ipso facto* notice thereof, and as a purchaser for value without notice of a judgment, would be protected in Equity by force of the fifth section of the 2 Vict. c. 11, the appointment would drive out the judgment at law, *Doe v. Jones*, 10 B. & C. 459, and in Equity, *Tunstall v. Trappes*, 3 Sim. 286, *Eaton v. Sanxter*, 6 Ib. 517.

But although such an appointment may give a safe, it will not effect a marketable, title. For should there have been registered judgments or incumbrances prior to the appointment, the appointee would not have the means of showing that he had not notice thereof. It is only in a case of emergency that such a proceeding should be resorted to.

INDEX.

ALIEN,

- could take to a use, 41.
- but defeasible on office found, *ib.*

APPOINTMENT,

- under power operating through statute, must not be to appointee to a use, 25.
- explanation of the effect of such appointment, 26.

ATTAINDER,

- use not forfeitable for, except by express enactment, 10.
- attainted person may take to a use, 41.
- defeasible on office found, *ib.*

BARGAIN AND SALE,

- might have been oral before statute, 11.
- did not require words of limitation, *ib.*
- inaptitude for settlement generally, 107.
- at the common law, 89, 108.

CESTUI QUE USE,

- nature of his interest before the statute, 11.
- in contingency could not assign at law, 59.

COMMON LAW,

- primâ facie*, assurance to operate by the common law, 57.

COMMON LAW POWERS OF SALE,

- their nature and effect, 89, *et seq.*

CONDITION,

- could not at common law be reserved to a stranger, 3.

CONDITIONAL FEE SIMPLE,

construction by judges before the statute *de donis* favored alienation, 35.

CONDITIONAL LIMITATIONS,

introduced by statute of uses, 35.

distinction between and contingent remainder, 55, *et seq.*

CONSIDERATION,

nominal, sufficient for legal operation of bargain and sale to be enrolled, 14.

but the statute of purchasers has effect notwithstanding, 15.

CONTINGENT REMAINDERS,

reason why a prior vested estate of freehold should support the same, 7.

difference of and conditional limitation, 55.

as to determination of, 59.

now indestructible by third person, 60.

not assignable at law, *ib.*

recent enactment on assignment, 51.

CONVEYANCE,

operating by transmutation of possession, 20.

not so operating, *ib.*

modern plan of conveyance, 106, *et seq.*

CORPORATION,

whether and when a corporation could stand seised to a use, 40.

considered that they might give but not take to a use, *ib.*

but the distinction was practically disregarded, *ib.*

COVENANT TO STAND SEISED,

created use before statute, 14.

why not within statute of enrolments, 21.

DECLARATION OF USE,

could not before statute control estate in seisin to use arising by act of law, 13.

DESCENT,

of use, before statute, followed that of the land, 12.

reasons for same, 33.

DEVISE,

- to uses, 64.
- uses were devisable, 10.

DISCLAIMER,

- of grantee to uses cannot defeat the same, 41, 95.

DISSEISIN,

- in order to execute a use, a person who has been seised to a use at or previously to the statute having been disseised, must have re-entered to pass the use, 58.

DOWER,

- dowress not bound by use, 13.
- observation on the ordinary uses for preventing dower, 111, *et seq.*

ENROLMENT,

- statute of, 20.
- cause for same, *ib.*

ENTRY,

- right of, not assignable at common law, 4.
- except *interessi termini*, 10.

ESCHEAT,

- use did not escheat, 10, 32.
- lord taking by, not subject to use, 13.
- with regard to resulting uses, 74.

ESTATES TAIL,

- conditional future or springing uses—whilst barrable by tenant in tail—not within law against perpetuities, 37, 55.

FEOFFMENT,

- when requisite, and mode of effecting same, 2.
- could not be *in futuro*, 3, 7.
- still the law for passing the common law seisin, *ib.*
- now unnecessary but not abolished, 106, *et seq.*

FREEHOLD,

- could not be *in futuro* on feoffment or grant at common law, 2, 3.
- use could not arise except on seisin of freehold or inheritance, 23.

FUTURE USE, 56.

GRANT,

to operate instantan on the legal ownership, cannot be from a day subsequent or from a future event subsequent to the grant coming into possession, 2, 3.

IMPLICATION,

uses by, 46.

INTERESSI TERMINI,

assignable at common law, 10.

JUDGMENT,

as to effect of registered judgment in exercise of powers of sale and exchange, 86, *et seq.*

KING or QUEEN,

cannot take to a use, 41.

LEASE AND RELEASE, CONVEYANCE BY,

obsolete, but still exercisable at the caprice of an owner, 106.

LEGAL OWNERSHIP,

rules for same at the common law irrespective of uses, 28.
examination of causes or reason for the same, 28, 29, 30.

LIVERY OF SEISIN,

the necessity thereof at the common law, 2.
a writing not necessary for its efficacy, *ib.*
charter of feoffment only evidence, inoperative in chief, *ib.*
where term of years first created with vested remainder over livery, was to termor, but if the freehold was to be in contingency, then the livery was ineffectual, 7.

MARRIED WOMAN,

can be grantee to use, 40.
disagreement to grant, ineffectual, *ib.*

PERPETUITY,

whether there could be any at common law, 35, 36.

POSSIBILITY OF REVERTER,

Mr. Preston's opinion, 6.
whether there was any on a limitation of the feoffment in fee simple *in futuro*, 6, 7, 8.

POSSIBILITY OF SEISIN. *See* SCINTILLA.

POWERS,

- to operate through statute are future and intrinsically contingent uses, 81.
- of revocation and new appointment, *ib.*
- where releasable or destructible, 82.
- power to lease when exercisable notwithstanding mortgage, 83, *et seq.*
- notwithstanding sale, *ib.*
- powers of sale and exchange, 85.
- as to exercise thereof, notwithstanding sale or mortgage, 86, *et seq.*
- whether exercisable notwithstanding registered judgment, 86, *et seq.*

REMAINDER. *See* CONTINGENT REMAINDER.

- could not have been limited after an interval from determination of the particular estate, and the reason thereof, 5, 6.
- but there might have been an alternate remainder, 6.
- question when a feoffment to one for life with remainder in contingency—in whom the ulterior fee was vested until the contingency, *ib.*
- its essentials, 55, *et seq.*

RENTS,

- de novo*, seisin thereof not limitable *in futuro*, 76.
- as to limitation for successive intails, 77.
- grant of by tenant in tail, *ib.*
- not escheatable, *ib.*
- follow descent at common law, *ib.*
- powers of entry and distress and perception for saving same, 78, 79.

RESULTING USE,

- its nature and operation, 47.
- where the same may be for a particular estate, 48.
- but generally only in fee simple, 49.
- disputed points on doctrine, 67, *et seq.*

REMAINING USE,

- what properly such, and not resulting use, 50.

REVERSION,

- grantable, 2.
- but not from future day, 3, 4, 5.
- whether in feoffor, when limitation for life, remainder in contingency, 5, *et seq.*

RIGHTS OF ENTRY OR ACTION,

- not assignable at the common law, 4.
- of entry to support contingent remainder, 59.

SALE AND EXCHANGE.

- exercise of powers, how interfered with by mortgage or by registered judgments, 86, *et seq.*

SCINTILLA JURIS.

- its nature, 43.
- now abolished, *ib.*

SEISIN,

- to a use, 40.
- who could stand seised to a use, 41.
- where deceased person named, *ib.*

SETTLEMENT,

- modern plan of, 95, *et seq.*
- its virtual operation without regard to the collocation of its clauses, 105.

SHIFTING USE, 71. *See* SPRINGING USES.

SPRINGING USES,

- their introduction, 35, 71.

TERMOR AND TERM OF YEARS,

- where first ownership a term of years—livery to termor—but unless the immediate freehold expectant thereon be vested—void, 6, 7.
- future right to term assignable at common law, 3.
- use could not take effect under statute on mere possession to a use, 23.
- but term of the legal ownership under uses of the seisin for same, 24.

USE,

- gave no estate, but assignable and devisable, 10.
- no forfeiture of for treason or felony, *ib.*
- by construction of the Court of Chancery, 11.
- by implication, *ib.*
- did not charge the land, 12.
- on the effect of a bargain and sale or covenant to stand seised before the statute, 20, 21.
- why the statute of enrolment was passed, 21.
- nature of ownerships on, and under and before the statute, 10.
- on a use by equitable ownership, 24, 25.

USE—*continued*.

instance thereof, 25.

distinction on ownerships acquired in uses after the statute, 32.

difficulties of the judges after the statute of uses, 33.

subject of the statute, 42.

taking effect on assurances operating by transmutation of possession, 43.

WAY,

cannot be conveyed to a use, 42.

THE END.

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